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Supreme Court of the United States

OCTOBER TERM, 1961

No. 81

THOMAS N. GRIGGS, PETITIONER,

vs.

COUNTY OF ALLEGHENY

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
COMMONWEALTH OF PENNSYLVANIA**

**PETITION FOR CERTIORARI FILED APRIL 18, 1961
CERTIORARI GRANTED JUNE 3, 1961**

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

**IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA**

Commonwealth of Pennsylvania,
County of Allegheny, ss.:

No. 2384—July Term 1958

THOMAS N. GRIGGS

v.

COUNTY OF ALLEGHENY

[fol. 4]

PETITION FOR APPOINTMENT OF VIEWERS—Filed May 29, 1958

To the Honorable, The Judges of said Court:

The petition of Thomas N. Griggs respectfully represents:

First: That he was on May 31, 1952, and for some period of time prior and subsequent to said date, the owner of a certain tract of real estate in the Township of Moon, Allegheny County, Pennsylvania, described as follows:

ALL that certain tract of land situate in the Township of Moon, County of Allegheny and Commonwealth of Pennsylvania, and bounded and described as follows:

BEGINNING at the intersection of the Macadam Road, known as the Coraopolis Road, with the Westerly line of property now or formerly of William McClinton Heirs, and running thence by the center of said Coraopolis Road South $65^{\circ} 26'$ West Five Hundred Twenty-three (523) feet to the center of a Macadam Road known as the Beaver Grade Road; thence by the same North $21^{\circ} 9'$ West Fifty-five and $53/100$ (55.53) feet to a point; thence by the same North $15^{\circ} 41'$ West Four Hundred Twenty and one-half

(420- $\frac{1}{2}$) feet to a point; thence by the same North 26° 29' West Six Hundred Sixty-one and 14/100 (661.14) feet to a point; thence by the same North [fol. 5] 38° 31' West Three Hundred Fifty-seven and 84/100 (357.84) feet to the center of road known as the Thorn Run Road; thence by said Road North 54° 51' East Three Hundred Seventy and 93/100 (370.93) feet to a point; thence by the same North 47° 27' East Three Hundred Sixteen and one-half (316- $\frac{1}{2}$) feet to line of land now or formerly of William McClinton Heirs aforesaid; and thence by said McClinton land South 21° East Sixteen Hundred Forty-eight (1648) feet to the place of beginning.

CONTAINING 19.161 acres.

HAVING erected thereon a two-story stone dwelling house, a-frame dwelling house and outbuildings.

Second: The defendant owns certain real estate in said Moon Township upon which it erected, maintains and operates the Greater Pittsburgh Airport. The said Greater Pittsburgh Airport was opened for commercial use on, to wit, June 1, 1952, and has been in continuous use since that time as an air terminal for the transportation for hire of passengers and cargo by air carriers and will continue to be so used.

Third: The defendant has entered into a lease with each of the airlines using said airport whereby, for certain considerations unknown to plaintiff, the airlines are granted [fol. 6] the right of ingress and egress to and from said airport; said lessees of the defendant being the Trans World Airlines, Inc., Eastern Airlines, Inc., Northwest Airlines, Inc., Capital Airlines, The Allegheny Airlines, Lake Central Airlines and later the United Airlines and the American Airlines.

Fourth: The defendant erected and maintains necessary facilities of the Greater Pittsburgh Airport three (3) runways for airplanes, being the East-West runway, the Northeast-Southwest runway and the Northwest-South-

east runway. The Northeast-Southwest runway is so erected and maintained that it points directly towards plaintiff's premises described in Paragraph First hereof at a distance of about one-half mile therefrom.

Fifth: From the opening of the Greater Pittsburgh Airport for commercial use, to wit, June 1, 1952, the aircraft of the several airlines under certain weather conditions take off at the extreme Northeast end of the said Northeast-Southwest runway towards plaintiff's property, and, in landing, glide low over plaintiff's property in order to land at the extreme Northeast end of said runway.

Sixth: The aircraft of the several airlines landing upon or taking off from the Northeast runway, descend thereto or ascend therefrom over plaintiff's property below the [fol. 7] safe navigable airspace as fixed and established by the Civil Aeronautics Board pursuant to the Acts of Congress for such case made and provided and as concurred in by the Pennsylvania Aeronautics Authority. The said safe navigable airspace begins in rural areas, at five hundred (500) feet above the ground or above any building erected thereon, and in congested areas at one thousand (1000) feet therefrom.

Seventh: From the opening of the Greater Pittsburgh Airport and the beginning of the use of the Northeast-Southwest runway, to wit, June 1, 1952, there have been continued flights of aircraft over the aforesaid described property of plaintiff in landing at and taking off from the Greater Pittsburgh Airport. That said flights were and are below the safe navigable airspace as specified by the Civil Aeronautics Board, namely five hundred (500) feet, and were and are at low levels and close to the property aforesaid.

Eighth: That by reason of said low flights the property of the plaintiff was and is greatly damaged and depreciated in value; that the use and enjoyment of the property have been interfered with by reason of the possible danger of the low flights, the noise and vibrations which they cause, their lights pointing at the premises at night time and interference with sleep and rest.

Ninth: The property of the plaintiff as herein described is within the "approach zone" as specified in the Zoning [fol. 8] Regulations of the defendant adopted January 4, 1954 by authority of the Airport Zoning Act of the Commonwealth of Pennsylvania 2 P.S. 1550-1563, which reads in part as follows:

"In any case in which (1) it is desired to remove, lower or otherwise terminate a nonconforming structure, or use, or (2) the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this act, or (3) it appears advisable that the necessary approach protection be provided by acquisition of property rights, rather than by airport zoning regulations, the political subdivision within which the property or nonconforming (sic) is located, or the political subdivision owning the airport, or served by it, may acquire by purchase, grant or condemnation, in the manner provided by the law, under which political subdivisions are authorized to acquire real property for public purposes, such air right avigation easement, or other estate or interest in the property or nonconforming structure, or use in question, as may be necessary to effectuate the purpose of this act."

Tenth: The property of the plaintiff is within the glide angle plane for the said Northeast-Southwest runway, which glide angle plane is in the "approach zone" and [fol. 9] is a trapezoidal plane; that is to say, the glide angle plane starts at the Northeast end of the paved portion of the Northeast-Southwest runway at a level of the paving and thence slopes upward at the rate of one (1) foot vertically for each forty (40) feet horizontally for such distance as may be within the limits of the so-called approach zone. The said glide angle plane as located on plaintiff's premises is below the "floor" of the navigable airspace as so prescribed by the Civil Aeronautics Board and concurred in by the Pennsylvania Aeronautics Authority. The center line of said glide angle plane is near the house erected thereon and that the bottom of said

plane is about fifteen (15) to thirty (30) feet above the chimney.

Eleventh: Immediately after the Greater Pittsburgh Airport was opened for commercial use, to wit, June 1, 1952, and the low flights over plaintiff's property began, the plaintiff, and other property owners in the area whose properties were similarly affected, made demand upon defendant to make just compensation for the damage either by agreement or by condemnation as provided for in the statute above quoted in part.

Twelfth: Defendant in response to such demand denied that it was or is liable for the damage caused by the low flights and has failed and refused to pass the necessary resolution for the condemnation of the avigation easements [fol. 10] necessary for egress and ingress to said airport with consequent payment of damages.

Thirteenth: The airlines likewise having denied liability, your plaintiff entered an action in equity at No. 1288 October Term, 1955 in the Court of Common Pleas of Allegheny County wherein he named the defendant County and the several airlines as parties defendant and made demand that said defendants be required to compensate for the damage or that the low flights over his property be enjoined.

Fourteenth: The aforesaid suit and companion suits of other property owners similarly affected have been before the Supreme Court of Pennsylvania on preliminary and procedural questions. While no final determination has been made of said suits and they are still pending, the Supreme Court has clearly stated that in those proceedings the Court of Common Pleas of Allegheny County sitting in equity cannot award damages consequential or otherwise for property taken, injured or destroyed as a necessary and unavoidable consequence of the construction and operation of the airport by Allegheny County for public use under statutory authority.

Fifteenth: The defendant in its Answer filed subsequent to the opinion of the Supreme Court entered May 23, 1955

at 382 Pa. page 38, asserts that the Greater Pittsburgh Airport is a public improvement constructed and maintained by defendant to provide airport and air transport facilities for the use of the general public and is one of the major facilities of the commercial and civilian transportation system of the United States, and is a major instrumentality in the commerce and postal system.

Sixteenth: The airlines serving the Greater Pittsburgh Airport, in their Answer filed after the opinion of the Supreme Court aforesaid, assert that to enable the public to have facilities for air transport of passengers and cargo, which facilities are necessary for the functioning of the airport, it is necessary that airplanes enter and leave the airport by passing through the airspace above the plaintiff's property below five hundred (500) feet.

Seventeenth: Defendant County likewise asserts that such flights over plaintiff's property below five hundred (500) feet are necessary for egress and ingress to said airport.

Eighteenth: That the dwelling house on said property was occupied by your petitioner and his family from 1944, and subsequent thereto, and that there are no other parties in interest.

Nineteenth: There are no liens or mortgages affecting plaintiff's property.

Twentieth: Based upon the aforementioned assertion of the defendant and the airlines serving the Greater [fol. 12] Pittsburgh Airport in their Answers filed in the said suit and the location of plaintiff's property on the glide angle of the Northeast runway of said Greater Pittsburgh Airport, plaintiff avers that as a necessary and unavoidable consequence of the operation of the Greater Pittsburgh Airport, the defendant, by reason of its right of eminent domain, has in fact appropriated for public use aviation rights or easements over and across plaintiff's property for the purpose of providing access to the airport by the planes of the airlines.

Wherefore your petitioner prays that your Honorable Court appoint a Board of Viewers in the manner provided by law and direct that:

1. The Board of Viewers shall, in limine, determine whether the erection and operation of the Greater Pittsburgh Airport beginning on June 1, 1952 with consequent necessary and unavoidable use of the airspace over and across plaintiff's property below the safe navigable airspace for the purpose of egress and ingress to and from said Greater Pittsburgh Airport constituted in fact an appropriation or "taking" by the defendant of an avigation easement over said property;

2. After the litigation as to the determination of the question set forth in preceding Paragraph 1. is finally decided by the Board of Viewers, or by a court of final [fol. 13] jurisdiction in the case, such determination shall be conclusive upon the parties;

3. Should the Board of Viewers determine that there was an appropriation or "taking" by the defendant, then it shall ascertain and award just compensation to your petitioner for the damage to his property arising out of such condemnation by the defendant.

And Your Petitioner Will Ever Pray, Etc.

Thomas N. Griggs, By William A. Blair, Attorney
in Fact.

IN THE COURT OF COMMON PLEAS

ORDER OF COURT APPOINTING BOARD OF VIEWERS—
May 29, 1958

And Now, to wit, this 29th day of May, 1958, on motion of William A. Blair and David B. Fawcett, Attorneys for petitioner, the Court appoints Thomas P. Trimble, Jr., Thomas M. Conrad and Paul G. McAtee, as a Board of Viewers upon the foregoing Petition and further orders that the Board of Viewers perform its duties in accordance with the law and Acts of Assembly in such case made

and provided; View - Tuesday, June 24, 1958 - 10 A.M.
o'clock D.S.T., Returnable - First Monday, March, 1959;

And Further:

It appearing to the Court that there are differences of opinion as to whether Thomas N. Griggs is entitled to [fol. 14] collect damages described in the Petition for Appointment of Viewers; and

It further appearing that if all the questions involved in this case are to be decided at the same time, the Board of Viewers would be unduly burdened by the evidence so that it would be required to hear testimony that would ultimately be ruled irrelevant.

It Is Therefore Ordered and Decreed:

1. The Board of Viewers shall, in limine, determine whether the erection and operation of the Greater Pittsburgh Airport by the defendant beginning on June 1, 1952 with consequent necessary and unavoidable use of the airspace over and across the aforesaid described property below the safe navigable airspace for the purpose of ingress and egress to and from said Greater Pittsburgh Airport constituted in fact an appropriation or "taking" by the defendant of an avigation easement over said property;

2. After the litigation as to the determination of the question set forth in preceding Paragraph 1. is finally decided by the Board of Viewers, or by a court of final jurisdiction in the case, such determination shall be conclusive upon the parties as to whether there was such appropriation or "taking" by the defendant;

3. Should the Board of Viewers determine that there was an appropriation or "taking" by the defendant, then [fol. 15] it shall ascertain and award just compensation to the plaintiff for the damage to his property arising out of such condemnation by the defendant.

By the Court, Weiss.

IN THE COURT OF COMMON PLEAS

ORDER OF COURT INSTRUCTING BOARD OF VIEWERS—

June 19, 1958

And now, to-wit, this 19th day of June, 1958 it appearing to the Court that on May 29, 1958, this Court entered the following order:

"AND NOW, to wit, this 29th day of May, 1958, on motion of William A. Blair and David B. Fawcett, Attorneys for petitioner, the Court appoints Thomas P. Trimble, Jr., Thomas M. Conrad and Paul G. McAtee as a Board of Viewers upon the foregoing Petition and further orders that the Board of Viewers perform its duties in accordance with the law and Acts of Assembly in such case made and provided. View Tuesday, June 24, 1958—10:00 A.M. Returnable 1st Monday in March, 1959.

"AND FURTHER

"It appearing to the Court that there are differences of opinion as to whether Thomas N. Griggs is entitled [fol. 16] to collect damages described in the Petition for Appointment of Viewers; and

"It further appearing that if all the questions involved in this case are to be decided at the same time, the Board of Viewers would be unduly burdened by the evidence so that it would be required to hear testimony that would ultimately be ruled irrelevant.

"IT IS THEREFORE ORDERED AND DECREED:

"1. The Board of Viewers shall, in limine, determine whether the erection and operation of the Greater Pittsburgh Airport by the defendant beginning June 1, 1952 with consequent necessary and unavoidable use of the airspace over and across the aforesaid described property below the safe navigable airspace for the purpose of ingress and egress to and from said Greater Pittsburgh Airport constituted in

fact an appropriation or "taking" by the defendant of an avigation easement over said property;

"2. After the litigation as to the determination of the question set forth in preceding Paragraph 1., is finally decided by the Board of Viewers, or by a court of final jurisdiction in the case, such determination shall be conclusive upon the parties as to whether there was such appropriation or "taking" by the defendant;

[fol. 17] "3. Should the Board of Viewers determine that there was an appropriation or "taking" by the defendant, then it shall ascertain and award just compensation to the plaintiff for the damage to his property arising out of such condemnation by the defendant.

BY THE COURT

s/ WEISS, J."

and it further appearing to the Court that in order that there be a prompt adjudication of the matters in dispute that the proceedings follow the ordinary and usual course:

Now, therefore it is ordered and decreed that the Order entered May 29, 1958 be and the same is hereby vacated and it is further ordered and decreed that the following order be and the same is hereby entered:

There is hereby appointed by this Court from the members of the permanent Board of Viewers appointed by law Thomas P. Trimble, Thomas M. Conrad and Paul G. McAtee as viewers in the matter within mentioned, and the said viewers are hereby ordered and directed to meet upon the line of the improvement and view the same and the premises affected thereby on Tuesday, the 24th day of June, 1958, at 10:00 o'clock A.M., E.D.S.T.; to hold such meetings as are necessary and hear all parties and witnesses in relation thereto and decide and true report make [fol. 18] concerning all matters and things submitted in relation to which they are authorized to inquire as directed by Acts of Assembly in such cases made and provided; the said viewers to give all parties notice as required by

Acts of Assembly and rules of this Court, and file a report in this Court on or before the 1st Monday of March, 1959, unless the time is hereafter extended.

.....
Soffel & Duff, JJ.

By the Court

W.

IN THE COURT OF COMMON PLEAS

AMENDMENT TO PETITION FOR APPOINTMENT OF VIEWERS—
Filed January 15, 1959

To the Honorable, the Judges of Said Court:

And now, comes the petitioner, Thomas N. Griggs, and moves the Court that he may be permitted to amend Paragraph Twentieth of the Petition for Appointment of Viewers filed in the above proceeding to read as follows:

Twentieth: Based upon the aforementioned assertion of the defendant and the airlines serving the Greater Pittsburgh Airport in their Answers filed in the said suit and the location of plaintiff's property on the glide angle of the Northeast runway of said Greater Pittsburgh Airport, plaintiff avers that as a [fol. 19] necessary and unavoidable consequence of the operation of the Greater Pittsburgh Airport, the defendant, by reason of its right of eminent domain, for the purpose of providing access to the airport by aircraft of the airlines, has in fact appropriated for public use an easement or fee simple interest in the airspace over plaintiff's property necessary for such purpose.

Thomas N. Griggs, Petitioner.

IN THE COURT OF COMMON PLEAS

**ORDER OF COURT APPROVING AMENDMENT TO PETITION FOR
APPOINTMENT OF VIEWERS—January 16, 1959**

And now, to wit, this 16th day of January, 1959, the foregoing Petition to amend the original Petition for Appointment of Viewers having been presented in open Court, and hearing had thereon, and upon consideration thereof, the amendment is approved and ordered to be filed.

By the Court

W.

[fol. 20]

PROCEEDINGS BEFORE THE BOARD OF VIEWERS

Transcript of Testimony—Filed July 15, 1959

VIEWERS:

Thomas P. Trimble, Jr., Esquire
Thomas M. Conrad
Paul G. McAtee

APPEARANCES

William A. Blair, Esquire, David B. Fawcett, Esquire,
Counsel for plaintiff.

Maurice A. Louik, Esquire, John W. Mamula, Esquire,
Counsel for County of Allegheny.

HEARING DATE—January 26, 1959

OFFERS IN EVIDENCE

Mr. Blair: May I offer in evidence Deed for the purpose of showing title only, of Mabelle R. McMahon, widow, to Thomas N. Griggs, dated the 22nd day of January, 1945, covering certain property, as will later be described, in the Township of Moon, and recorded in Deed Book Volume 2827, page 386. If your Honors please, when we visited the Airport with the County and I believe Mr. Conrad was

also present, they made available to use there certain maps which I think are necessary in the determination of the various facts relating to the problem before this Court. We will offer this general map in evidence as Exhibit "B" which shows locations—

[fol. 21] Mr. Louik: If you tell us what date you are concerned with we will be able to furnish master plans as of prior dates.

Mr. Blair: I don't know that that is very material.

Mr. Louik: This is a master plan as of 1957.

Mr. Blair: Shows no change with respect to the northeast-southwest runway from the time the Airport opened?

Mr. Louik: That is right.

Mr. Blair: We offer in evidence Exhibit "C" which is a print showing the approach zone from the northeast runway and which includes the Griggs property as well as that of K. C. Gardner, each of which is located within the approach zone as shown on that map. This map also shows the elevations of the houses and the center line of the approach zone.

Mr. Fawcett: This map is marked as the approach zone and glide angle of the northeast runway and it is dated October 9, 1953.

Mr. Blair: I will offer this plan in evidence and it is agreed by Counsel for the County and the plaintiff that there has been no change in the glide angle or approach zone since the opening of the Airport for commercial purposes in June of 1952. We offer in evidence Exhibit "D" which is a sketch of the northeast glide angle from the end [fol. 22] of the northeast runway showing the glide angle over the Griggs property and ground elevation as well as the elevation of the house on the property. I asked for the Airport Zoning Ordinance. Do you have it?

Mr. Louik: If the Court please, we have all these papers available and we will bring them over upon request.

Mr. Trimble: The zone map as it is called as well as the zoning regulations.

Mr. Blair: I offer plaintiff's Exhibit "E" being an Airport Zoning Regulation of the County of Allegheny, Pennsylvania.

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Mr. Mamula: We object to the offer of the Airport Zoning Ordinance as being immaterial in connection with the present proceeding.

Mr. Trimble: There will have to be a further reason than immateriality. I am not going to sustain an objection on immateriality. You will have to be specific.

Mr. Mamula: Objected to for the reason that the Airport Zoning is not to be construed as a basis for the taking of any private property in and about the Airport insofar as the restrictions on use. It has no bearing in the proceeding before this Board.

Mr. Trimble: Might the zoning map which is part of the zoning regulations itself be construed as in any way, shape [fol. 23] or form fixing a metes and bounds over this property to such an extent that it might be considered an easement?

Mr. Mamula: The question of the type, the frequency and the number of flights that go over the property of the plaintiff is the issue at hand and whether such flights, the type, nature and their frequency constitutes a taking is, I think, the mandate to this Board to determine that only and not as to whether or not there is some restriction on use insofar as height or type of structure that can be erected on plaintiff's property, which is a separate and distinct principle. Isn't that what we are doing here—that the issue has been remanded to your Board to make certain findings that will determine the quantum of the take, the nature of the take, if any, over what property, and the date of the taking—all of which is to be the result of the compilation of data and testimony here so that you can tell the type, nature and the frequency of flight. Enacting an Ordinance doesn't constitute any of the elements—the factual elements that I understood this proceeding to embrace.

Mr. Trimble: Up to this moment. I am going to admit it and I will rule on it later. I want to see what has been done by the County.

Mr. Blair: I think the Board has a mandate from the Supreme Court to determine everything that has been done in connection with the Airport situation and the Zoning

[fol. 24] Ordinance is very pertinent to that as it assumes dominance over airspace within those zones as shown on the zoning map.

Mr. Trimble: I just let it in. We will rule later as to whether or not it is material.

Mr. Louik: I'd like to add one thing. The zoning regulations do only one thing. They limit certain uses and they limit the certain heights of structures. Now, if the plaintiff is intending that we took the property by reason of the adoption of the zoning regulations I think he is improperly before this Court. That would invalidate the zoning regulations and the proper procedure would have been an attack upon the zoning regulations. If that is not the basis then the uses—the limitation of the uses of this property has nothing to do with this case.

Mr. Blair: It does have directly because the zoning ordinance was issued for the purpose of providing safe access in and out of the Airport by the airplanes which use the Airport, and the County has undertaken to prescribe those regulations, what may or may not be done within those particular zones leading to the runways.

Mr. Louik: This is no more pertinent than the City zoning regulations limiting the residences that may be so constructed. It is not an issue before this Board.

[fol. 25] Mr. Trimble: We may so find when we come to that point. We are not going to rule on it now.

Mr. Blair: I offer also as Exhibit "F" the zoning map of the Greater Pittsburgh Airport.

Mr. Mamula: We enter the same objection to the zoning map as we did to the zoning ordinance and for the same reason.

Mr. Trimble: I will rule later on it. We are going to get everything into this thing so we can have one hearing and one hearing only. The Board will make the rulings later.

Mr. Blair: If your Honors please, we asked the County to furnish lease agreements with the air lines relating to the use of the Airport.

Mr. Trimble: The County has informed the Board they would do it when they were requested and I am sure they will.

Mr. Blair: I ask that they be produced.

Mr. Louik: So as not to clutter up this record we have identical agreements with all of the air lines. Do you want us to bring all of the agreements or will one agreement be sufficient?

Mr. Blair: Was it a uniform agreement with all of them?

Mr. Louik: It is a uniform agreement with all of the air lines which were entered into either in June of 1952 or subsequently when the new air lines came and we have [fol. 26] a renewal of that agreement in '57. We can bring one agreement that was entered into in 1952 and follow it up with an agreement when it ran out in June of 1957.

Mr. Fawcett: Were the agreements for five year periods?

Mr. Louik: The air lines that were there.

(Off the record discussion.)

Mr. Blair: If your Honors please, we also ask to be produced at the present time the lease and agreement between the County and the Federal Government relating to the Airport the agreement as to the erection of the Airport, the contribution of the Government and whatever obligation the County assumed with regard to the operation of that Airport.

Mr. Louik: As I told Mr. Trimble, we have several hundred agreements with different agencies of the Federal Government and we have a number of grants and agreements. I still don't know exactly what you want.

Mr. Trimble: We are only talking about the flight of aircraft.

Mr. Louik: We have an agreement with the Air Force for the use of certain area of the Airport and we have what is known as a grant agreement. We have a number [fol. 27] of those whereby they have contributed certain funds to the County. They are all identical and we can bring over one.

Mr. Blair: Do you have a master agreement at the beginning or do they all show the obligation of the County?

Mr. Louik: Every time we request aid from the Federal Government there is a grant agreement and there are any number of those. They are all identical—a statutory form that the Federal Government has and we can bring those over.

Mr. Trimble: To what extent would they be material?

Mr. Blair: Under the Federal Airport Act which provides for aid by the Federal Government to municipalities in connection with the operation of the Airport it says the condition precedent to the approval of the Commissioner, or whatever the head of that department was in Washington, of a project under this chapter, the Administrator shall receive assurances in writing, satisfactory to him that all facilities of the Airport developed with Federal Aid and all those usable for the landing and take-off of aircraft will be available to the United States for military and naval aircraft in common with other aircraft—and there are obligations under that Act that are assumed when a municipality receives contributions or aid from the Federal Government.

[fol. 28] Mr. Louik: I would like to say this—we will bring them over, but I would like to call the Board's attention to the recent case handed down in California in connection with the Western Air Lines where it was specifically held by the Court of Appeals out there that any provision of the grant agreement of the Federal Government were not or could not be used by a private party in a case against the Airport or the Air Lines, but we will have a copy of these grant agreements here. We don't believe there is anything in that agreement that has a bearing on this case, but we will bring it in. We do have an agreement with the Air Force about the military planes. They have exclusive use of a certain portion of that field. We have basically two types of arrangements with the Federal Government. One is the grant agreement which is signed by any Airport that receives Federal aid. In addition, we have at the Greater Pittsburgh Airport something which they have only at a few Airports and that is we have a lease agreement with the Federal Government whereby they have exclusive use of a certain portion of the field at the Greater Pittsburgh Airport and they also have use in

common with all other users of the Airport the remaining portion of the field. That agreement was entered into back in 1945 or 1946, and it runs for some twenty-five years. I did not understand that Mr. Blair asked for that.

[fol. 29] Mr. Trimble: I would think he is talking of the way he would like to tie in that the County gets a grant from the United States and in partial consideration the County must not refuse admission to any military planes.

Mr. Blair: If you keep in mind that Airport legislation in Washington is to promote air travel, not for military alone, but for the public—they would have no inclination to contribute to the Greater Pittsburgh Airport to serve unless it was going to be used for the receiving of the public as well as the military and that Act so says. They'd never grant funds to a municipality only for the purpose of the military. They'd operate it themselves if that were the case.

Mr. Trimble: That is in addition to the other conditions? Private and public air lines and also the military?

Mr. Blair: That is right. To promote air commerce. I'd like to ask the County if they have taken any records of altitudes of flights over these properties and measurements by decibels of sounds over the said properties?

Mr. Louik: If the Court please, I don't think we have to produce our evidence to the plaintiff. I don't think we have to reveal what we have done to prepare our case.

Mr. Trimble: We will get to that later on.

[fol. 49] THOMAS N. GRIGGS, sworn:

Direct examination:

By Mr. Blair:

Q. Mr. Griggs, will you describe just what took place with regard to plane operation over your property beginning in June of 1952? Was there a pattern of flight?

A. Mr. Blair, beginning in June of 1952, with the opening of the commercial airport there began a stream of planes landing and taking off over my residence and land-

ing and taking off and causing the results to which I testified this morning and in addition other results. I have to explain in connection with my prior answers that runway use is partially a matter of wind direction. The altitude of planes coming in over a runway or going out over a runway varies to some degree with the weight of the equipment, [fol. 50] the size of the plane, and also with weather conditions, but from June 2, 1952, when that runway was in use with commercial airplanes the living conditions in that house were unbearable.

Q. Did you notice the type of airplanes?

A. Yes sir—and I kept—not continuous records, but I kept some records of the use of that runway. I turn first here in 1952 and I think the first record I have in this book is Sunday, June 15—late Sunday afternoon—planes—Allegheny Air Lines, Capital and T.W.A.

Q. How did you know those airplanes?

A. I could see the designations on the ships.

Q. You mean you could read the letters on the planes?

A. Yes sir. And other times I knew the designations on the tails and on the fuselage. I could identify the planes and very often could pick them that way—also the colors.

Q. What did you notice about them on that date for instance?

A. I noticed they were coming close to my tree tops. I also noticed the noise. The next note I have is Monday, June 16, planes at dinner time and in the evening; wakened three times during the night and in the early morning, and I marked that I had seen both T.W.A. and Capital that day. Now, I note here because I said I couldn't keep these records always and I don't think it was my burden to, [fol. 51] but Monday, the 24th, 25th, 26th and 27th I was away. My next note—planes landing Sunday June 29 in the late afternoon. My next notation—planes landing late afternoon Sunday—June 29. Wednesday, July 2—planes landing. Thursday, July 3—planes landing.

Q. Why did you notice them particularly, Mr. Griggs?

A. Because they interfered with my life and my use and my happiness in my home.

Q. Because of the height, noise—or what was it?

A. Because of the noise when planes were landing, Mr. Blair, and also you will find places where they are taking off and that also interfered with my life. I also had some fears in connection with it because the planes were so close to my house, and those fears were confirmed at a later date as to which I shall testify after I get through with this part of it.

Q. Any vibration caused by these planes?

A. Yes, sir.

Q. How did you notice that and what effect did it have?

A. Window frames would rattle, and I noticed I could feel vibration on the second floor, and sometimes—I am not going to say these particular days, as I testified before the planes would go by and I could hear plaster drop behind the walls, little noises of plaster.

[fol. 52] Q. Did you have any idea how high those planes were or have any knowledge of their height?

A. Mr. Blair, what I think I would prefer to do is put in my records and come back to the place because I want to identify something here.

Q. Okay—proceed.

A. I was out of town early in June, getting home on July 10. On Saturday, July 12, planes were landing all day and night over my house, and that is a night when I had about two or three hours sleep. On Sunday, July 13, there were planes early. On Monday, July 14, I was at home in the evening and I have this notation that planes were landing—6:00 P.M.—on trees. What I meant by that was on or near the tree tops. I was on the 'phone—heard the planes. I noted here I had seven telephone calls that evening and I had to interrupt them because of these planes and put them in later. My notes at 8:00 P.M. on that day—T.W.A. plane over the house and I could read the number of it. At least the number is here. I show at 8:00 o'clock an Air Force plane was down towards the road. I show then—over the trees—a private plane. I show at 8:10 Capital Airlines; 8:12 an Air Force plane; 8:12—was an Air Force plane; 8:15 T.W.A. These times—whether it be 8:15 or 8:15½—they are as close as I could take them because I wasn't working with a stop

[fol. 53] watch. 8:45 Capital; 8:46 National; 9:00 o'clock—private red plane; 9:10 T.W.A.; 9:23—I have noted lights were on—T.W.A. The next plane after that—Allegheny Airlines—as nearly as I could tell. Next plane—9:25 Army; 9:40 T.W.A. or Capital—I couldn't be sure. I have something here I can't read with ditto marks for 9:43; 9:48 and 9:52. I have at 11:00 and 12:00 during the night—wakened; and 5:00 A.M., and 7:00 A.M. the next morning. The next night my note is—worked until 11:30; 12:00 midnight plane overhead. Wednesday, July 16, 5:00 A.M.—wakened. I was around the house in the morning and a transport went over when I was on the telephone. Several Army planes low over trees in front of house. 1:05 Allegheny Airlines—over trees. Then marked here some jets and transports, from 2:00 until 4:30. Capital—4:40; followed by Air Force; T.W.A. at 4:40; Capital—4:43; Capital—4:45; T.W.A.—4:46. Then a jet over the house—then another jet—another jet—Capital—4:55; Capital 5:04; 6:55—Capital; T.W.A.—7:40; Capital—8:00 o'clock. Then Thursday—July 17, fog in the morning. Then I go with another list of planes. On Friday, July 18—wakened by planes at 6:00 o'clock in the morning. Planes during the evening and night. Saturday, July 19—[fol. 54] five planes—6:00 to 7:30. Several during the interim between 7:30 and 9:40. Capital at 9:40; 10:00 o'clock Allegheny; 10:05—T.W.A. Then sometime after 10:00 o'clock unidentified commercial; 10:09 Allegheny Airlines; 10:15 Air Force. Sunday, July 20, at night—11:00 to 12:00 six to seven planes. There is a note I was awakened twice after that. Monday, July 21—planes again at night. That is where I stopped keeping a record there.

By Mr. Mamula:

Q. May I see that book?

A. Sure.

By Mr. Blair:

Q. Did you keep any additional records from time to time?

A. Yes sir—I have a lot of records here. In this book I

started April 4, 1953—airplanes last night. April 5—airplanes last night. April 6—ditto.

Q. What do you mean by that?

A. Airplanes were flying over my house on that runway landing that night, or taking off.

Q. How high were they flying?

A. They were low enough to waken me, Mr. Blair, that is how I knew it.

By Mr. Fawcett:

Q. How frequent?

[fol. 55] A. Mr. Fawcett, I can't answer that for every night. I have ideas about the overall frequency of it based on my observation. For the present all I can do—I can't stand up there all night and try to identify every plane that flies over, nor can I spend all my time watching the clock during the night. April 5—planes last night; April 6—planes last night; April 7—planes last night; April 8 airplanes took off last night; April 9—last night airplanes wakened me at 1:00 and 3:00. April 10—airplanes last night; April 11—planes last night; six between 11:15 and 12:15—I think it is. April 12—planes last night; April 13—planes last night until wind changed. April 23—planes last night; April 24—planes last night—bad take-off I have marked. May 2—planes last night; May 4 planes bad last night; May 8—planes last night; May 12—planes last night; May 13—planes last night; May 17—planes last night; May 22—planes last night. Monday—May—25—some planes last night; May 26—planes last night; May 29—planes last night; and I might add most of the interruptions where there is no record—these books show I was out of town. July 14, 1953—planes last night. I have a note here that they used all runways, and one took off high over the house this morning about 8:00 o'clock. Capital came in low. Wednesday, July 15—planes last night. July [fol. 56] 17, planes last night—take-offs today. July 22, planes. July 23—planes. July 25—planes last night. There are a couple of these that say "see file memos" and I will get the file memos in a minute. July 28—planes today. September 9—planes last night. September 11—planes last

night. September 12—planes last night and this morning—wakened.

By Mr. Blair:

Q. When you have in your memoranda "planes last night" do you mean one plane or more planes than one or a pattern of planes?

A. I am talking about enough planes, Mr. Blair, to interfere with my night's rest. Now, you will have to understand that wind conditions change. They changed and varied. I have watched that Airport many times under certain wind conditions and have seen planes take off in one direction and immediately after a plane take off in the opposite direction because the wind is not a controlling factor. Essentially what I am trying to say is sometimes the traffic can be substantial and I am talking about commercial traffic on one runway or the other runway or on the center runway. At other times depending on the wind it can be distributed between them. I am talking about the planes during the night that interfered with sleep and rest in our household.

[Vol. 57] Q. Mr. Griggs, I show you plaintiff's Exhibit "P", "Q" and "R". What are they?

A. Mr. Blair, this is a part of a calendar which calendar was on the wall of our kitchen. I gave instructions in the daytime because I was not there to write on this calendar when planes were over our property on take-off or landing. This first calendar covers the month of May, 1953, down through December, 1953. The second calendar runs from January, 1954, through December, 1954. The third calendar is for the year of 1955. I should say, Mr. Blair, in connection with these records as well as the ones I kept—they are not complete. There were more planes than were recorded here, but the ones that are on there do show the use of that runway when the records were kept.

Q. By whom were they taken?

A. My wife and our cook.

Q. Under your direction?

A. They were.

Q. Did you consult with them from time to time?

A. I did—and asked them and that is where I say they are not complete. Sometimes I asked if they had kept the record and they said no and then I asked them again to do it.

Q. These were made under your direction?

A. They were.

• • • • •

[fol. 85] By Mr. Blair:

Q. What did you record in the memoranda?

A. Mr. Blair, I took this memoranda by sitting in my property observing planes going over my property and landing on the northeast-southwest runway of the Airport.

Q. What, as to the number of planes could you tell or could you recall the number of planes that you saw flying over your property at that particular time?

A. Where I can count them on this memoranda—marked on the memoranda is the approximate time of each plane that went over for the most part. I will be happy to read it into the record.

Q. All right—read it.

A. 6:15—one Capital Airlines—this particular one was not over my property. 6:25 to 6:45 one Capital, one Eastern, three T.W.A., one Allegheny Airlines, two Capital. 6:55 to 7:10—two T.W.A. and then here is a word I can't read. 7:15—T.W.A. cut to southwest corner of my property. 7:16—U.S. Air Force. 7:25 Capital. 7:25—U.S. [fol. 86] Air Force. 7:26—one silver plane with a black rudder—small. 7:36 T.W.A. curved from the south. 7:38—Capital curved from the north. 7:50—U.S. Air Force over road. 7:52—Allegheny Airlines. 7:58—one white plane with blue trim—small. 8:10—a plane came over while I was at the telephone, and I recall that I couldn't hear and had to stop until the plane went past. 8:15—T.W.A. 8:30—Eastern. Then one U.S. Air Force and then from 9:30 to about 9:45—six commercial planes. Then I have the notation—"all evening." Then during the night "awakened twice". I have Thursday morning—9:30 A.M. to 9:45 about six. 9:58—Capital. 10:10—jet over the property turned north and three jets very high. 10:45—T.W.A. 11:02—

T.W.A. 11:14—commercial over Jenks across the road, cut low over the corner of my property. 11:15—Capital cut up from the southwest corner. 11:16 a plane I couldn't identify, and about the same time A.A.A.—Allegheny Airlines. About 11:18—Allegheny Airlines. 11:20—Capital up from the southeast corner. 11:25—T.W.A. 11:33—T.W.A. 11:37—Capital. 11:41—Eastern—with a question mark. 11:50—Here is one with a number—I think it is NS 8867—right over the house. I think that is it—it is not too plain. 11:51—Allegheny Airlines. 11:52—jet far down. 11:55 Lake Central. 11:56—Capital—question mark. 11:56 [fol. 87] —T.W.A. 11:58—Air Force. 12:05—T.W.A.—something about coming low. 12:07—T.W.A.—higher than usual. 12:10—Capital and then 12—I can't read it —T.W.A.—two. Then I have them marked there with jets on the field—12:14. I have the record 12:29—I was in the house and one plane came over the house. I have a note 12:31 Air Force not landing but below 500 feet. I have 12:40—a blue and white plane private. I have 12:55—looked like Air Force—red and white. Then I had at 1:05—four motor—big white Air Force plane diagonally across property. 1:30—National. 1:34—Capital. Then 1:35 to 2:45 I have no notations as far as I can recall it. 2:40—Eastern. Then I noted a couple of planes here going over other houses in the area. 4:20 Allegheny Airlines. 4:22—two jets. I have a notation—jets playing. I have 4:30 Air Force. 4:35—T.W.A.—curving in from the north. 4:37—T.W.A. 4:40—T.W.A. Then I have another note here that is not too clear to me—away from my property an Eastern. Then I have 5:00 o'clock—Northwest Airlines. I should say that in recording those times—the planes come into vision from the front of my house a considerable distance away to the east of me, and come over my property and then I watch that plane go over and my timing on picking up the next one and recording it all depends on when I [fol. 88] turn around and look at the next one—so the times are approximately accurate, but there is no accurate way to start to measure the time at a particular place or the beginning of a plane coming into sight.

Q. Mr. Griggs, I notice from your memoranda you describe the planes. Were they flying so low that you could read the lettering on them?

A. Most of them. Private planes of course would fly in high and the private planes were no real bother to us. It was primarily the commercial ships and I could read the designations on the side, see the colors, see the markings, and many times see at least part of the numbers of the planes.

Q. When the planes came in at night did they have lights—that is the planes that were landing?

A. Mr. Blair, when the planes were landing they did put their lights on before they came to the easterly boundary of my property.

Q. On the take-offs were their lights on?

A. At the beginning and for some time after the operation of the commercial Airport commenced they would have their lights on on the end of the runway and they would remain on past my house. At a subsequent stage of it they often turned their lights off. I am talking about the bright lights now—not the lights that are on when a [fol. 89] plane is in flight during the night. Sometimes before they got to my property.

Q. Mr. Griggs, were the flights of the aircraft over your property as you related them yesterday and this morning—flights landing and taking off the northeast runway of the Greater Pittsburgh Airport?

A. Mr. Blair, my testimony except for particular designations where I have said other property on those memos related only to planes that were coming over my property going into Greater Pittsburgh Airport on the northeast runway or taking off from the northeast runway.

[fol. 104] Q. Did you make any effort to learn the number or percentage of flights over the northeast runway in and out of the Airport?

A. I did.

Q. In what manner did you make that effort?

A. I inquired of Mr. Austin White who was the C.A.A. representative in the Control Tower, I think in 1953. He was present at the meeting I testified to in June of 1953.

Q. Did you ask him for the percentage of operations over the northeast runway—the record of flights?

A. Yes I did. I asked about the records of the runways. The information given to me was that there was no record.

Mr. Mamula: If the Board please—I object to a conversation with Mr. White with respect to the frequency of flight.

Mr. Trimble: Is Mr. White available for this Board? Do you know?

Mr. Blair: He is no longer there.

[fol. 105] Mr. Trimble: Is he available for this Board?

Mr. Mamula: We can find that out, Mr. Trimble. He is not the present C.A.A. representative.

Mr. Trimble: Any records available for this Board of the flights made in and out of this Airport for 1953 on this runway?

Mr. Mamula: No sir.

Mr. Trimble: The objection is overruled. Let's hear what Mr. White had to say.

(Witness continuing) Mr. White told me there was no record of which runways were used for the landing or take-offs in that period of time.

By Mr. Blair:

Q. All right now Mr. Griggs, you mentioned yesterday the sales of two parts of your property?

Mr. Mamula: Before we proceed may I amend my answer. I don't know whether the question was directed to me as to whether or not there are any records; that would have to be a qualified "no" on my part. There are records which are destroyed periodically.

Mr. Conrad: Are those the ones they destroy every thirty days?

[fol. 106] Mr. Mamula: I think Mr. Conrad knows of what I speak, and Mr. Blair and Mr. Fawcett, who were present when the C.A.A. representative told us that a recording of all flight conversations in and out of the Airport is recorded on tape for a period of thirty days, for purposes of reference in case of accident for investiga-

tion or infraction of any rule. Subsequent to the 30th day that tape is cleaned and re-used on a machine which we all looked at. There are five or six tape recorders that record for a period of four hours, then automatically shift onto another tape for an additional four, so that when I answered "Were there any records?" I think I said "no". With that explanation I still say no—other than the number of flights in and out—take-offs and landings at the Airport, there are records but not broken down as to any of the three runways.

Mr. Blair: That is what we are trying to develop. That is what we tried to find out at that time whether there was any record maintained of the operation of the various planes over the various runways in and out of the Greater Pittsburgh Airport.

Mr. Mamula: The answer to that would have to be yes, but they are not maintained beyond a period of thirty days. [fol. 107] Mr. Fawcett: Mr. Mamula, do you know when they started to keep these records.

Mr. Mamula: Nothing other than what you heard the man tell us jointly last Friday.

Mr. Blair: No record available anywhere to show the number of planes which used the northeast runway from June 1, 1952, up to within thirty days from the preceding date—isn't that about what you are saying.

Mr. Mamula: Anything that happened in the period of time in excess of thirty days preceding yesterday or today has been wiped out insofar as it being an aid in determining the number of flights.

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[fol. 193]

BEFORE THE BOARD OF VIEWERS

REPORT OF VIEWERS—Filed July 15, 1959

To the Honorable, the Judges of Said Court:

The undersigned, members of the permanent Board of Viewers of Allegheny County, who were duly appointed by your Honorable Court as Viewers in the above and foregoing matter, respectfully report:

They met upon said property at the time and place named in the Order of your Honorable Court and examined the premises affected, and then and there adjourned to meet at the Court House of said County at Pittsburgh, Pennsylvania, on the 26th day of January, 1959, when and where and at subsequent adjournments of said meeting, they heard the parties in interest desiring to be heard and witnesses, touching all matters upon which they had authority to inquire and act; and they estimated and determined the damages for property taken, injured or destroyed thereby, and to whom the same are payable.

They prepared a Preliminary Report awarding to the plaintiff \$12,690.00 inclusive of detention money and gave notice to the parties of the time and place when and where said Viewers would meet and hear exceptions thereto.

Requests for Findings and Conclusions were presented and are made part hereof and marked Exhibits Nos. 1 and 2.

[fol. 194] That at the time and place so fixed, they met and heard exceptions which are attached hereto and marked Exhibits Nos. 3 and 4, together with the notes of testimony which are filed under separate cover and hereto referred to as Exhibits Nos. 5 and 5-A.

They file herewith and make part hereof a photostatic copy of Exhibit "C" showing the improvement and the premises affected.

They also file herewith and make part hereof their Findings of Fact and Conclusions of Law.

All of which is respectfully submitted.

T. B. Trimble, Jr., T. M. Conrad, Paul G. McAttee,
Viewers.

July 15, 1959.

PRELIMINARY REPORT

The undersigned Viewers have prepared the attached Statement of Facts, Question of Law and Conclusion without Exhibits; found damages including detention money in the sum of Twelve Thousand, Six Hundred Ninety and

no/100ths (\$12,690.00) Dollars, and submit the same to Counsel in lieu of regular form and notice.

Exceptions to said award may be filed in writing at the Office of the Board of Viewers within five (5) days from [fol. 195] the date of this notice and any exceptions so filed will be heard on April 22, 1959, at 9:30 o'clock, A. M.

T. B. Trimble, Jr., Thos. M. Conrad, Paul G. McAtee,
Viewers.

Acceptance of Service: David B. Fawcett, Attorney for Plaintiff; John W. Mamula, Attorney for Defendant.

FINDINGS

Thomas N. Griggs, Plaintiff, is a resident of Allegheny County, Pennsylvania; and was the owner in fee of the following tract of land and improvements thereon in Moon Township, Allegheny County, Pennsylvania:

ALL that certain tract of land situate in the Township of Moon, County of Allegheny and Commonwealth of Pennsylvania, and bounded and described as follows:

BEGINNING at the intersection of the macadam road, known as the Coraopolis Road, with the Westerly line of property now or formerly of William McClinton Heirs, and running thence by the center of said Coraopolis Road South $65^{\circ} 26'$ West five Hundred Twenty [fol. 196] three (523) feet to the center of a macadam road known as the Beaver Grade Road; thence by the same North $21^{\circ} 9'$ West Fifty-five and $53/100$ (55.53) feet to a point; thence by the same North $15^{\circ} 41'$ West Four Hundred Twenty and one-half ($420\frac{1}{2}$) feet to a point; thence by the same North $26^{\circ} 29'$ West Six Hundred Sixty-one and $14/100$ (661.14) feet to a point; thence by the same North $38^{\circ} 31'$ West Three Hundred Fifty-seven and $84/100$ (357.84) feet to the center of road known as the Thorn Run Road; thence by said Road North $54^{\circ} 51'$ East Three Hundred Seventy and $93/100$ (370.93) feet to a point; thence by the same North $47^{\circ} 27'$ East Three Hundred Sixteen and one-half ($316\frac{1}{2}$) feet to a line of land now

or formerly of William McClinton Heirs aforesaid; and thence by said McClinton land South 21° East Sixteen Hundred Forty-eight (1648) feet to the place of beginning.

CONTAINING 19.161 acres.

HAVING erected thereon one large stone and stucco residence two cottages, a four-car garage with apartment above, a frame br and pump house.

The County of Allegheny, Defendant, a "public agency" sponsored, owns and maintains the Greater Pittsburgh Airport on land purchased by it in Moon and Findlay [fol. 197] Townships as a public improvement to provide airport and air transport facilities for the use of the general public in conformity with the Rules and Regulations of the Civil Aeronautics Administration within the scope of the "National Airport Plan."

Among said facilities, the Northeast-Southwest runway with "clear zone" and "approach area"; said "approach area" extending beyond and over the land of said Griggs.

Plaintiff's Exhibit "O" is composed of three executed documents, with amendments, between the County of Allegheny and The United States of America (Acting through the Administrator of Civil Aeronautics) designated "Project Application", "Sponsor's Assurance Agreement" and "Grant Agreement", the relevant parts of which are:

- a. Agreement by County to abide by and adhere to the Rules and Regulations of Civil Aeronautics Administration (Project Agreement).
- b. . . . "the sponsor (County of Allegheny) "will maintain a master plan of the airport, including" . . . "approach areas" . . . (Sec. 1 b. Sponsor's Assurance Agreement).
- c. . . . "The airport approach standards to be followed in this connection shall be those established [fol. 198] by the Administrator in Office of Airports Drawing No. 672 dated September 1, 1946, unless

otherwise authorized by the Administrator"; and the County of Allegheny further agreed that it

"will acquire such easements or other interests in lands and air space as may be necessary to perform the covenants of this paragraph" (Sec. 1 j. Sponsor's Assurance Agreement).

- d. "The airport approach standards to be followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 672 dated September 1, 1946, unless otherwise authorized by the Administrator." (Paragraph 8 (i) of Amended "Grant Agreement."

That in compliance with said Rules and Regulations of Civil Aeronautics Administration the County of Allegheny laid out and submitted for approval said "Master Plan" including required "approach areas" which was approved by said Civil Aeronautics Administration and adopted as the plan for the Class V airport sponsored by the County of Allegheny and designated as the "Greater Pittsburgh Airport". A copy of part of said plan designating the [fol. 199] location of approach area and property of plaintiff is adopted as Viewers' Plan and attached hereto and marked Exhibit "C".

The approved and established standards for approach area for Northeast runway were center line extension 10,000 feet beyond "clear zone", a 200' strip of same width and elevation of runway as projected, with gradient of 1 on 40 having splayed slope surface with lateral width extended uniformly from 500 feet to 2500 feet with varying depths or heights from zero to 250 feet at end of center line projected 10,000 feet.

The residence of said plaintiff is bisected by a theoretical line vertical to the center line of runway as projected 3250 beyond end of "clear zone" within said approach area; and said center line being 420 feet more or less eastwardly from center of said residence.

The portion of plaintiff's property within said approach area contains the residence, garage, stucco cottage, tennis

courts and elaborate landscaping; and 6.1 acres of land, more or less.

Said Viewers' Plan shows elevation at end of northeast runway to be 1150.50 feet above sea level; the door sill of plaintiff's home to be 1183.64 feet above sea level; the top of chimney of said home to be 1219.64 feet above sea level; the slope gradient of approach area to be as 40 is to 3250' or 81 feet above 1150.50' or 1213' thus leaving a clearance [fol. 200] of 11.36 feet at plaintiff's residence, or the difference between height of aircraft on climb out or let down to runway elevation of 1150.50 flying on a 1 on 40 gradient 3250' distant (sic) from end of "clear zone".

The date of opening Greater Pittsburgh Airport was June 1, 1952, said date of opening being so designated by Resolution of the Commissioners of Allegheny County adopted May 27, 1952.

Affective (sic) as of said date of opening Defendant executed leasehold agreements in conformity with Rules and Regulations of Civil Aeronautics Administration with the several commercial airlines licensed by Civil Aeronautics Board to use Greater Pittsburgh Airport granting inter alia the right "to land, take off" * * *

Since the opening of said Greater Pittsburgh Airport the Northeast runway with its approach area has been in regular operational use for landing and taking off of commercial and other aircraft in regular flight patterns at heights near and over plaintiff's residence and over plaintiff's land on take-off varying from thirty (30) feet to three hundred (300) feet, and on let-down fifty-three (53) feet to one hundred fifty-three (153) feet.

The interference by the low flight of airplanes with plaintiff's existing use and enjoyment of his property resulted [fol. 201] from the noise, disturbances and vibration created by such airplanes as well as the fear for personal safety caused by the low flights in close proximity to the plaintiff's residence; said noise of planes over plaintiff's property on let-down to the Northeast runway being comparable to that of a noisy factory, and in take-off to the noise of a riveting machine or steam hammer.

The low altitude flights over plaintiff's property caused the plaintiff and occupants of his property to become ner-

vous and distraught, eventually causing their removal therefrom as undesirable and unbearable for their residential use.

The opening of Greater Pittsburgh Airport and its consequences caused a diminution in value of plaintiff's property in its adapted use.

Plaintiff's Requests for Findings of Fact accepted and substantially incorporated herein are as follows: 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 30, 31, 32, 33. Those denied are: 9, 12, 13, 14, 17, 26, 27, 34, 35, and 36.

Plaintiff's Requests for Conclusions of Law are accepted as follows: 1, 2, 3, 4 and 5 to the extent that the latter conforms to the conclusions herein. Those denied are: 6.

Defendant's Requests for Findings of Fact accepted as follows: 1, 3, 6, 7, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 29, 30, 31, and 32. Those denied [fol. 202] are: 2, 4, 5, 8, 9, 10, 25 and 28.

Defendant's Requests for Conclusions of Law are denied in toto.

QUESTION

Is the County of Allegheny liable to T. N. Griggs as the result of the exercise of its power of eminent domain in the location, laying out and opening of Greater Pittsburgh Airport?

DISCUSSION

The property of Griggs lies beneath the area projected from the end of the "clear zone", being a 200-foot long strip corresponding with the width and elevation of the concrete Northeast runway. This area is designated as the "approach area" and has the same center line projected as said runway. It was located with engineering precision in compliance with Civil Aeronautics Administration "standards" as to width, length and depth to meet the Federal qualifications and requirements for the laying out and public use of a "Continental Airport" such as the County of Allegheny proposed for the Greater Pittsburgh Airport.

The "standards" adopted and used in the laying out by the County of Allegheny of this Northeast runway approach area were an extension of the center line 10,000 [fol. 203] feet beyond clear zone with a gradient of 1 to 40 and having a splayed slope surface with lateral width extending uniformly from 500 to 2500 feet. The approach area thus has varying depths or heights from zero at clear zone elevation to 250 feet at the end of the center line projected 10,000 feet. At the Griggs' property the surface of the approach area is only 11.36 feet above the residence due to the increase in elevation of the land, which is shown on Plaintiff's Exhibit "C" and adopted as the Viewers' Plan bearing the same letter identification.

In the law, as distinguished from airmen's and engineers' parlance in which "glide angle" is in common usage, the word "approach" has a definite and positive meaning. It is an integral part of a public structure, like a bridge, but for its existence, the structure would be incomplete and without public utility. In a controversy between Penn Township and Perry County, reported in 78 Pa. 457, where the County built only the bridge structure and left the approach for the Township to construct, the Supreme Court of Pennsylvania, by Mr. Justice Gordon, said (p. 459):

"The design of bridging is to provide a safe and convenient passage for the public over some stream or ravine, but no such passage is afforded when the structure cannot be approached. Can a house be said to be finished until there are steps up to its doors or [fol. 204] stairs to its chambers? And how can a bridge be said to be completed without the proper means of access? Certainly this is so necessary to its use, that without it, the structure is a vain thing; utterly useless and of no account. The bridge is incomplete until everything necessary for its proper use has been supplied, and every such necessary appliance is part of the bridge. When, therefore, the Act of Assembly directed the counties of Dauphin and Perry to build this bridge over the Juniata, it meant that these two counties without the aid of the townships

should provide a safe and convenient passage or highway over that river, and not merely that they should set up a structure which the public could not reach."

Citing the *Penn Township case, supra*, the eminent past Dean of the Dickinson Law School, Trickett, in his authoritative "Pennsylvania Road Law", has this to say (p. 330):

"The bridge is not composed merely of its piers, abutments, arches and superstructure. Whatever is necessary to make feasible ingress and egress, is a part of it, and if the County has become liable to erect the bridge it has ipso facto become liable to construct these approaches."

In addition to bridges, the same view of the law has been applied to subways. *Knoll v. Harborecreek Township*, 86 Pa. Super. Ct. 423.426.

[fol. 205] Laying out this approach imposed a burden on the land of Griggs for the flight of aircraft to and from the Greater Pittsburgh Airport. To this extent the County of Allegheny has exercised the power of eminent domain conferred upon it by implication by the Act of May 21, 1923, P. L. Sec. 1, which reads as follows:

"That any county of the second class in this Commonwealth is hereby authorized and empowered to acquire by lease, purchase or condemnation proceedings any land within the limits of the County for the purpose of establishing and maintaining thereon airdromes or aviation landing fields, whenever the county commissioners of the county, by resolution duly adopted deem it advisable so to do."

Although the County of Allegheny purchased all the "land" required for the location of the physical structures at the Airport, it had been invested with the right to appropriate such land and the grant of that right carried with it by necessary implication the power to take all interests in land necessary to operate the Airport facilities for public use. Such an implied grant of power of eminent domain is analogous to that of railroads for the construc-

tion of switches and sidings, as to which it was held in *Beaver Borough v. Beaver Valley Railroad Company*, 217 Pa. 280, 286:

[fol. 206] "The right to build the switch and siding is included as a necessary incident in the right to build a railroad . . . even where there is no expressed power in the charter to construct switches, it is clearly to be inferred from the general power conferred, and the essential purposes of the grant."

The power to appropriate "land", therefore, carried with it the power to appropriate an easement over the land and the laying out of that easement by a plan constituted an act of dominion or condemnation by the County of Allegheny. The resulting burden upon the land is similar to that which follows the laying out of a street or road.

The "taking" of the superterranean easement over the property of Griggs became effective on June 1, 1952, at 1201 A. M., by virtue of the Resolution of the Commissioners of Allegheny County dated May 27, 1952, designating that date and hour as the time for the opening of the Greater Pittsburgh Airport for public user. Consequently, the right to damages accrued at that time.

The damages allowed by the Viewers have been measured by the usual procedure of deducting the after value from the value of the property as a whole immediately before and unaffected by the public improvement, to which has been added 6% per annum interest as detention money from the date of opening the Airport. We have found that the highest and best use of the property was as a [fol. 207] country estate. We determine the "after" diminished value of the property as being directly and immediately caused by frequent low flying to and from the Airport, inevitably producing noise, vibration, fear of disaster, anxiety and general interference with the peaceful and quiet enjoyment of the property by the owner, resulting in damages to the extent of \$12,690.00.

T. P. Trimble, Jr., T. M. Conrad, Paul G. McAtee,
Viewers.

July 15, 1959.

[fol. 208]

EXHIBIT No. 1 TO REPORT

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

No. 2384

July Term, 1958

THOMAS N. GRIGGS,
Plaintiff

v.

COUNTY OF ALLEGHENY,
DefendantPLAINTIFF'S REQUEST FOR FINDINGS OF
FACT AND CONCLUSION OF LAW

*To the Honorable, Thomas P. Trimble, Jr., Thomas M.
Conrad and Paul G. McAtee, Viewers.:*

Now comes the Plaintiff, Thomas N. Griggs, by his attorneys, William A. Blair and David B. Fawcett, and respectfully requests your Honorable Board to make the following Findings of Fact and Conclusions of Law in the above captioned case:

FINDINGS OF FACT

1. Thomas N. Griggs, Plaintiff, is a resident of Allegheny County, Pennsylvania.
2. The County of Allegheny, Defendant, is a political subdivision of the Commonwealth of Pennsylvania.
3. Thomas N. Griggs, Plaintiff, on the dates material to this action was the owner in fee of the following tract [fol. 209] of land and improvements thereon in Moon Township, Allegheny County, Pennsylvania:

ALL that certain tract of land situate in the Township of Moon, County of Allegheny and Commonwealth of Pennsylvania, and bounded and described as follows:

BEGINNING at the intersection of the macadam road, known as the Coraopolis Road, with the Westerly line of property now or formerly of William McClinton Heirs, and running thence by the center of said Coraopolis Road South $65^{\circ} 26'$ West Five Hundred Twenty-three (523) feet to the center of a macadam road known as the Beaver Grade Road; thence by the same North $21^{\circ} 9'$ West Fifty-five and $53/100$ (55.53) feet to a point; thence by the same North $15^{\circ} 41'$ West Four Hundred Twenty and one-half ($420\frac{1}{2}$) feet to a point; thence by the same North $26^{\circ} 29'$ West Six Hundred Sixty-one and $14/100$ (661.14) feet to a point; thence by the same North $38^{\circ} 31'$ West Three Hundred Fifty-seven and $84/100$ (357.84) feet to the center of road known as the Thorn Run Road; thence by said Road North $54^{\circ} 51'$ East Three Hundred Seventy and $93/100$ (370.93) feet to a point; thence by the same North $47^{\circ} 27'$ East Three Hundred Sixteen and one-half ($316\frac{1}{2}$) feet to line of land now or formerly [fol. 210] of William McClinton Heirs aforesaid; and thence by said McClinton land South 21° East Sixteen Hundred Forty-eight (1648) feet to the place of beginning.

CONTAINING 19.161 acres.

HAVING erected thereon one large stone and stucco residence, two cottages, a four car garage with apartment above, a frame barn and pump house.

4. The Greater Pittsburgh Airport is owned and maintained by the County of Allegheny, on land owned by it, in Moon and Findlay Townships.

5. The Greater Pittsburgh Airport is a public improvement constructed and maintained to provide airport and air transport facilities for the use of the general public.

6. The Greater Pittsburgh Airport comprises, among other facilities, a large Administration Building and landing areas assigned to each of several commercial airlines.

7. The County owns and maintains at said Airport, and as an integral part thereof, a system of runways for the landing and taking off of airplanes at said Airport, being known and designated as the Northeast-Southwest runway, the East-West runway, and the Northwest-Southeast runway. (Exhibit B.)

[fol. 211] 8. The Plaintiff's property is located in the "Approach Zone" or the glide angle or glide path of said Northeast runway. (Exhibits C., D., E. and F.)

9. The Plaintiff's property is situate approximately Thirty-one Hundred (3100) feet from the end of the Northeast runway.

10. The Greater Pittsburgh Airport, including the facilities connected therewith, was opened for public use on June 1, 1952. (Exhibit G., p. 32.)

11. At or about the time the said Airport was opened for public use, the County of Allegheny entered into leases with certain commercial airlines whereby, for the considerations therein named, it granted to them, in connection with the Greater Pittsburgh Airport, the right, inter alia, "to operate a transportation system by airplane for the carriage of persons, property, cargo, and mail . . . to land, take-off, fly, taxi, tow, park, load and unload airlines' aircraft and other equipment used in the operation of scheduled, shuttle, courtesy, test, training, inspection, emergency, special charter, sightseeing and other flights . . .".

12. That prior to the opening of the Airport for public use, the said Airport was used solely for the landing and taking off of military planes.

13. That said military planes were mostly of the lighter type or two motor planes; that said military planes did not follow a flight pattern in and out of said Airport, and made [fol. 212] only occasional low flights over Plaintiff's property.

14. That said flights of military airplanes in and out of the Airport did not interfere with the use and enjoyment of Plaintiff's property. (Testimony, pp. 32 and 57.)

15. Since the opening of said Greater Pittsburgh Airport on June 1, 1952, for public use, the Northeast runway has been used for the landing and taking off of commercial and other aircraft.

16. Commencing on June 1, 1952, regular patterns of flight of aircraft landing at and taking off from the Northeast runway and other runways available at the Greater Pittsburgh Airport were established.

17. That the extent and periodic duration of the use of said Northeast runway varies with wind and weather conditions, as well as the availability of the other runways.

18. That beginning June 1, 1952, the property of the Plaintiff became subject to regular flights of airplanes in landing at and taking off from the Northeast runway at said Airport.

19. That such flights were, and are, at such low altitudes and at such frequent intervals as to constitute a direct and immediate interference with Plaintiff's use and enjoyment of the land.

[fol. 213] 20. The interference by the low flight of airplanes with Plaintiff's existing use and enjoyment of his property resulted from the noise, disturbances and vibration created by such airplanes as well as the fear for personal safety caused by the low flights in close proximity to the Plaintiff's residence. (Testimony, pp. 26, 27, 28, 36 and 85.)

21. That the noise of planes over Plaintiff's property in landing at the Greater Pittsburgh Airport on the Northeast runway is comparable to a noisy factory. (Testimony, p. 84.)

22. That the noise of planes over Plaintiff's property in taking off the Northeast runway is comparable to the noise of a riveting machine or steam hammer. (Testimony, p. 84.)

23. As a result of the low and frequent flights over Plaintiff's property, the Plaintiff and the occupants of his property became nervous and distraught, the property became unfit as a residence, and Plaintiff and his family were compelled to remove therefrom. (Testimony, pp. 54, 55 and 57.)

24. As a further result of the low and frequent flights of aircraft over Plaintiff's property, it was rendered undesirable and unbearable for normal residential use and has suffered serious loss in value. (Testimony, pp. 34 and 35.)

25. That the said "Approach Zone" or glide angle or glide path of flight over Plaintiff's property begins about [fol. 214] two hundred (200) feet from the Northeast end of the Northeast runway, at a width of five hundred (500) feet and gradually increases to a width of twenty five hundred (2500) feet at a distance of ten thousand two hundred (10,200) feet from the end of said runway. (Exhibits C. and D.)

26. That the said "Approach Zone" or glide angle or glide path is approximately one thousand (1,000) feet in width at the distance of thirty-one hundred (3100) feet from the Northeast end of the Northeast runway. (Exhibits C. and D.)

27. The approach zone to the Northeast runway includes all the property of Plaintiff extending from the Southerly side or front thereof Northwardly a distance of six hundred (600) feet and passes over the principal buildings thereon.

28. That the said Northeast runway is a non-instrument runway, and the "slope" or angle thereof is forty to one (40:1) or forty (40) feet of horizontal distance to one (1) foot of vertical distance. (Exhibits C., D. and E.)

29. That the bottom of said glide angle or glide path is approximately forty-three (43) feet above the ground level of Plaintiff's residence and approximately thirteen (13) feet above the chimney on said residence. (Exhibits C. and D.)

30. That the heights of airplanes over Plaintiff's residence on taking off from the Greater Pittsburgh Airport [fol. 215] vary from thirty (30) feet to three hundred (300) feet, and on landings fifty-three (53) feet to one hundred fifty-three (153) feet. (Testimony, pp. 55 and 56.)

31. The flights of aircraft over Plaintiff's property are below the safe altitude of flight as prescribed by the Federal Aviation Agency (formerly Civil Aeronautics Authority) and as adopted by the Pennsylvania Aeronautics Commission.

32. Landing of aircraft at the Greater Pittsburgh Airport cannot be accomplished from the safe altitude of flight of five hundred (500) feet above Plaintiff's property. (Exhibit D.)

33. The "approach zone" over Plaintiff's property to the Northeast runway is necessary to provide airport and air transport facilities for the use of the general public and is a part of said Airport.

34. That the fair market value of Plaintiff's property before the Greater Pittsburgh Airport was opened for public use on June 1, 1952, was Seventy-five Thousand (\$75,000.00) Dollars.

35. That the fair market value of Plaintiff's property on and after June 1, 1952, when the Greater Pittsburgh Airport was opened for public use and as affected by such public use is Forty Thousand (\$40,000.00) Dollars.

[fol. 216] 36. That Plaintiff has been damaged by reason of such public use in the amount of Thirty-five Thousand (\$35,000.00) Dollars.

CONCLUSIONS OF LAW

1. The County of Allegheny, owner of the Greater Pittsburgh Airport, is empowered to acquire by grant, purchase or condemnation land and property rights necessary to accomplish the public purpose of the Greater Pittsburgh Airport.

2. The approach zones at the Greater Pittsburgh Airport, including the Northeast approach zone, are necessary

to provide airport and air transport facilities for the use of the general public and are a part of the Greater Pittsburgh Airport.

3. The flights of airplanes over the Northeast approach zone of the Greater Pittsburgh Airport are at such low altitudes over Plaintiff's property as to interfere with and prevent his existing use and enjoyment thereof.

4. The ownership of such airspace over Plaintiff's property as is necessary to the enjoyment of the use of the surface is vested in the Plaintiff.

5. The County of Allegheny has taken and appropriated for public use a permanent avigation easement or a fee simple interest in the airspace over Plaintiff's property [fol. 217] extending from the Southerly side or front thereof Northwardly a distance of six hundred (600) feet beginning at thirteen (13) feet above the principal residence thereon and extending vertically to the safe altitude of flight a distance of five hundred (500) feet above said property.

6. As a result of such taking or appropriation the property of the Plaintiff has been damaged in the amount of Thirty-five Thousand (\$35,000.00) Dollars.

Respectfully submitted,

WILLIAM A. BEAN
DAVID B. FAWCETT
Attorneys for Plaintiff

[fol. 218]

EXHIBIT No. 2 TO REPORT

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

No. 2384

July Term, 1958

THOMAS N. GRIGGS,
Plaintiff

v.

COUNTY OF ALLEGHENY,
Defendant

PROPOSED FINDINGS OF FACT AND CONCLUSIONS
OF LAW FOR CONSIDERATION OF THE
BOARD OF VIEWERS

The County of Allegheny by Maurice Louik, its Solicitor, John W. Mamula, its Second Assistant Solicitor, and Thomas J. Dempsey, its Assistant Solicitor, respectfully submits the following proposed findings of fact and conclusions of law for consideration of the Board of Viewers appointed in this action.

FINDINGS OF FACT

1. Thomas N. Griggs, hereafter called plaintiff, purchased a tract of land in Moon Township, Allegheny County, on January 22, 1945 from Mabelle R. McMahon, for the sum of \$20,000 the said property consisting of somewhat over 19 acres, and having erected upon it a main residence, a 4 car garage with apartment above, a frame cottage, a pump house and a frame stable or barn.
2. At the time the plaintiff purchased the said property he was familiar with the existence and location of the Greater Pittsburgh Airport owned by the County of Allegheny in Moon Township.

3. The plaintiff occupied the said property with his family as a residence until shortly after December 1, 1955 at which time he and his family moved to another home.

4. The plaintiff sold the main house and somewhat over 4 acres by deed of general warranty dated March 26, 1956 for \$25,000 to the Board of Trustees for the Episcopal Diocese of Pittsburgh.

5. By deed of general warranty dated July 27, 1956 plaintiff sold the 4 car garage with the apartment above and 1.2 acres of ground to Franklin E. Bashline and Alice I. Bashline, his wife, for \$9000.00.

6. Plaintiff is still the owner of approximately 15 acres of the original tract purchased by him having a frame barn or stable, a frame cottage and a pump house erected thereon.

7. The frame cottage located on the property of the plaintiff has been occupied by tenants paying a rental of [fol. 220] \$25.00 per month from sometime prior to June 1, 1952 until the present with a vacancy at only one time of a couple of weeks.

8. In 1940 the County of Allegheny acquired the Bell farm in Moon Township for airport purposes, and thereafter continued to acquire other property and to construct the Greater Pittsburgh Airport.

9. In 1941 the Greater Pittsburgh Airport began operating as a base for military planes.

10. The zoning ordinance of Moon Township dated May 10, 1943 which was effective when the plaintiff bought his property shows the location of the County airport on the zoning map made a part of the ordinance, and also shows the property of Mabelle R. McMahon, the predecessor in title of the plaintiff, in an area zoned residential A, which classification allows single family residences and certain non-residential uses.

11. By Resolution dated May 27, 1952, the Board of County Commissioners of Allegheny County fixed the opening date of the Greater Pittsburgh Airport for commercial airlines services as June 1, 1952 at 12:01 A.M.

12. By leases dated June 3, 1952 and by subsequent leases, the County of Allegheny granted to TWA, Capital Airlines and other airlines the use of the airport premises [fol. 221] in common with others including the right to operate a transportation system by airplanes, the right to land, take-off and fly aircraft, and the rights of ingress to and egress from the premises and facilities of the Greater Pittsburgh Airport. The payments due from the airlines for these rights were to become effective as of the day which the Board of Commissioners of Allegheny County by Resolution designated as the opening date of the airport for commercial airline services.

13. On June 1, 1952, the Greater Pittsburgh Airport opened for commercial airline services in accordance with the Resolution of the Board of Commissioners, and commercial flights into and from the airport commenced on that day and have continued since that time. At the time that the airport was opened for commercial purposes, the County owned approximately 1500 acres in fee simple.

14. In landing and taking-off at the Greater Pittsburgh Airport, the aircraft of the commercial airlines utilize one of the several runways constructed and existing at the airport depending upon wind and other conditions and circumstances existing at the time of the landing or take-off.

15. The property of the plaintiff lies to the North and East of an extension of the center line of the Northeast-Southwest runway of the Greater Pittsburgh Airport and [fol. 222] distant 3450 feet from the northeasterly end of the Northeast-Southwest runway though separated from the airport boundary and the runway terminus by intervening properties, by the Allegheny County Airport Parkway, a divided 4 lane express highway, and by the Coraopolis Carnot Road. The property of the plaintiff lies within the designated approach zone for aircraft utilizing the Northeasterly end of the Northeast-Southwest runway as it existed in June of 1952 and as it exists to date.

16. On June 15, 16 and 29 of 1952 aircraft flew over plaintiff's property at indeterminate altitudes.

17. On July 2, 3, 12, 13, 14, 15, 16, 18, 19, 20 and 21 of 1952 aircraft flew over plaintiff's property at indeterminate altitudes.

18. On April 4, 5, 6, 8, 9, 10, 11, 12, 13, 23 and 24 of 1953 aircraft flew over plaintiff's property at indeterminate altitudes.

19. On May 2, 4, 8, 12, 13, 17, 22, 25, 26 and 29 of 1953 aircraft flew over plaintiff's property at indeterminate altitudes.

20. On July 14, 15, 17, 21, 23, 25 and 28 of 1953 aircraft flew over plaintiff's property at indeterminate altitudes.

21. On August 12 and 13 of 1953 aircraft flew over plaintiff's property at indeterminate altitudes.

[fol. 223] 22. On September 9, 11 and 12 of 1953 aircraft flew over plaintiff's property at indeterminate altitudes.

23. On October 13 and 20, 1953 aircraft flew over plaintiff's property at indeterminate altitudes.

24. On November 16 and 17 of 1953 aircraft flew over plaintiff's property at indeterminate altitudes.

25. The plaintiff made no proper measurement of the altitude of the above mentioned flights above or in the vicinity of his property and his recollections of many of them are limited to the existence of "planes overhead" though a number of flights disturbed his sleep and made conversation difficult.

26. The plaintiff's own valuation testimony was based upon the value to him of his property as a country estate type home.

27. The plaintiff's expert real estate witness fixed the after-value of the plaintiff's property as affected by the alleged taking on May 15, 1952, which was prior to the time the airport was opened for commercial airline use and prior to the time the plaintiff complained of aircraft flights over or in the vicinity of his property.

28. The Board of Commissioners of Allegheny County has never adopted a Resolution or other official enactment [fol. 224] appropriating plaintiff's property or any part of

his property or any interest in his property by virtue of the eminent domain powers vested in the County of Allegheny.

29. There is no evidence of any control exercised over any aircraft by the County of Allegheny.

30. All flights into and out of the Greater Pittsburgh Airport are regulated by the Civil Aeronautics Administration of the United States of America.

31. No flights of aircraft have been shown to be in violation of any regulations of the Civil Aeronautics Administration.

32. No flights were shown to be lower than necessary for a safe landing or a safe taking-off.

CONCLUSIONS OF LAW

1. The plaintiff has not proved that the nature, character and frequency of the flights of aircraft over or in the vicinity of his property were such as to constitute a taking of his property or any part of it or any interest in it by any person, organization or body, public or otherwise.

2. There were no flights of aircraft over plaintiff's property below the navigable air space of the United States of America.

[fol. 225] 3. The County of Allegheny has not by Resolution, official enactment, or otherwise taken plaintiff's property or any part of it or any interest in it for any purpose or use.

4. The plaintiff has not proved by any competent evidence that the fair market value of his property was depreciated by reason of any flights of aircraft over or in the vicinity of his property.

Respectfully submitted

MAURICE LOUIK
County Solicitor

JOHN W. MAMULA
Second Assistant County
Solicitor

THOS. J. DEMPSEY
Assistant County Solicitor

[fol. 226]

EXHIBIT No. 3 TO REPORT

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

No. 2384

July Term, 1958

THOMAS N. GRIGGS,
Plaintiff

v.

COUNTY OF ALLEGHENY,
DefendantEXCEPTIONS TO PRELIMINARY REPORT
OF BOARD OF VIEWERS

AND NOW, comes Thomas N. Griggs, Plaintiff, by his attorneys, William A. Blair and David B. Fawcett, and respectfully files Exceptions to the Preliminary Report of the Board of Viewers in the above captioned case, as follows:

1. Plaintiff excepts to the action of the Board in denying Plaintiff's Request for Findings of Fact Nos. 9, 12, 13, 14, 17, 26, 27, 34, 35 and 36.
2. Plaintiff excepts to the action of the Board in denying Plaintiff's Request for Conclusion of Law No. 6.
3. Plaintiff excepts to the award of the Board in that the Board erred in substituting for the uncontroverted expert testimony of Plaintiff's case as to damages, said testimony being predicated upon views made before and immediately after the taking, to wit, June 1, 1952, the Board's own ideas of value predicated upon its view made more than six years after the taking and after the residence [fol. 227] property portion had changed hands; such action

is contrary to the intent of the statutes establishing the Board and its powers.

4. Plaintiff excepts to the award as being arbitrary, capricious and against the weight of and contrary to the uncontradicted evidence.

5. Plaintiff excepts to the award on the grounds that the Board disregarded the only sound evidence of damage under the circumstances of this case.

6. The Plaintiff excepts to the award as being contrary to law, for the award is contrary to the evidence binding upon the Board under the circumstances of this case.

7. Plaintiff excepts to the award for damages including detention money in the sum of Twelve Thousand Six Hundred Ninety and 00/100 (\$12,690.00) Dollars as inadequate.

8. WHEREFORE, the exceptant, reserving the right to file additional exceptions, respectfully requests the Board to correct and make the said award conform to law and to the evidence.

WILLIAM A. BLAIR

DAVID B. FAWCETT

Attorneys for

Thomas N. Griggs

And now 13 July, 1959 exceptions overruled.

T. P. TRIMBLE, JR.

T. M. CONRAD

PAUL G. McATEE

Viewers

[fol. 228]

EXHIBIT No. 4 TO REPORT
IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
No. 2384
July Term, 1958

THOMAS N. GRIGGS,
Plaintiff

v.

COUNTY OF ALLEGHENY,
Defendant

EXCEPTIONS

The County of Allegheny excepts to the award made by the Board of Viewers to THOMAS N. GRIGGS in the above entitled proceeding for the following reasons:

1. The award of the Board of Viewers in the sum of \$12,690.00 is contrary to law and the weight of the evidence.
2. The award is excessive.

MAURICE LOUIK
County Solicitor
THOS. J. DEMPSEY
Assistant County Solicitor

And now 13 July, 1959 exceptions overruled.

T. P. TRIMBLE, JR.
T. M. CONRAD
PAUL G. McATEE
Viewers

[fol. 229]

IN THE COURT OF COMMON PLEAS

ORDER OF MAY 29, 1958

Allegheny County, ss:

At a Court of Common Pleas, held and kept at Pittsburgh, on the 29th day of May in the year of our Lord one thousand nine hundred and Fifty-eight, before the honorable W. H. McNaugher, President Judge of said Court:

The Petition of Thomas N. Griggs, was presented, setting forth that

Order of Court

And now, to-wit, this 29th day of May, 1958, on motion of William A. Blair and David B. Fawcett, Attorneys for petitioner, the Court appoints Thomas P. Trimble, Jr., Thomas M. Conrad and Paul G. McAtee, as a Board of Viewers upon the foregoing Petition and further orders that the Board of Viewers perform its duties in accordance with the law and acts of Assembly in such case made and provided. View, Tuesday, June 24, 1958, 10 A. M. o'clock D.S.T., Returnable First Monday, March, 1959.

And Further:

It appearing to the Court that there are differences of opinion as to whether Thomas N. Griggs is entitled to collect damages described in the Petition for Appointment of Viewers; and

It further appearing that if all the questions involved in this case are to be decided at the same time, the Board of [fol. 230] Viewers would be unduly burdened by the evidence so that it would be required to hear testimony that would ultimately be ruled irrelevant.

It Is Therefore Ordered and Decreed.

1. The Board of Viewers shall, in time, determine whether the erection and operation of the Greater Pittsburgh Airport by the defendant beginning on June 1, 1952

with consequent necessary and unavoidable use of the airspace over and across the aforesaid described property below the safe navigable airspace for the purpose of ingress and egress to and from said Greater Pittsburgh Airport constituted in fact an appropriation or "taking" by the defendant of a navigation easement over said property;

2. After the litigation as to the determination of the question set forth in preceding Paragraph 1. is finally decided by the Board of Viewers, or by a Court of final jurisdiction in the case, such determination shall be conclusive upon the parties as to whether there was such appropriation or "taking" by the defendant;

3. Should the Board of Viewers determine that there was an appropriation or "taking" by the defendant, then it shall ascertain and award just compensation to the Plaintiff [fol. 231] for the damage to his property arising out of such condemnation by the defendant.

By the Court, Weiss.

From the Record, David B. Roberts, Prothonotary,
by Louis W. Sauers, Deputy.

[SEAL]

Filed May 29, 11:42 AM, 1958.

IN THE COURT OF COMMON PLEAS

EXCEPTIONS OF PLAINTIFF TO REPORT OF BOARD OF VIEWERS—Filed August 13, 1959

And Now, comes Thomas N. Griggs, Plaintiff, by his attorneys, William A. Blair and David B. Fawcett, and respectfully files Exceptions To Report of Board of Viewers in the above captioned case, as follows:

1. The Board of Viewers erred as a matter of law in substituting for the uncontroverted expert testimony of the Plaintiff as to damages, its own idea of value predicated upon its view made more than six (6) years after the taking.

2. Action of the Board of Viewers in disregarding the uncontradicted evidence as to Plaintiff's damage and sub-

stituting its own judgment with respect to damage is contrary to law.

[fol. 232] 3. The Board of Viewers erred as a matter of law in disregarding the evidence as to property values and substituting its own ideas.

4. Plaintiff excepts to the award as being arbitrary and against the weight of and contrary to the uncontradicted evidence.

5. Plaintiff excepts to the award on the ground the Board disregarded the only sound evidence of damage under the circumstances in this case.

6. Plaintiff excepts to the award as being contrary to law, for the award is contrary to the evidence binding upon the Board under the circumstances of this case.

7. Plaintiff excepts to the award for damages, including detention money from the date of the opening of the airport namely, June 1, 1952, in the sum of \$12,690.00 as inadequate.

Wherefore, the Plaintiff, reserving the right to file additional Exceptions, respectfully requests your Honorable Court to correct and make the said award conform to the law and to the evidence in this case.

William A. Blair, David B. Fawcett, Attorneys for
Thomas N. Griggs, Plaintiff.

[fol. 233]

IN THE COURT OF COMMON PLEAS

EXCEPTIONS OF DEFENDANT TO REPORT OF VIEWERS—Filed August 14, 1959

The County of Allegheny excepts to the Report of Viewers filed and confirmed nisi on July 15, 1959 and to the award to Thomas N. Griggs in the amount of \$12,690.00 for the following reasons:

1. As a matter of law the plaintiff failed to sustain the burden of proof on him to show that the nature, character and frequency of flights of aircraft over or in the vicinity of his property were such as to constitute a taking of his prop-

erty, or any part of it, or any interest in it, by any person, organization or body, public or otherwise.

2. The plaintiff did not show that there were any flights of aircraft over his property below the navigable air space of the United States of America.

3. The plaintiff did not show that any flights of aircraft were in violation of any regulations of the Civil Aeronautics Administration, which organization controls and regulates the flight of aircraft.

4. The plaintiff did not show that any flights of aircraft were lower than necessary for safe landings or safe take-offs.

5. The plaintiff failed to show that the County of Allegheny exercised any control over the flights of any aircraft.

[fol. 234] 6. There was no basis for a finding by the Viewers that the defendant had appropriated any portion or interest in the plaintiff's property since the Board of Commissioners of Allegheny County never adopted a Resolution or other official enactment appropriating plaintiff's property, or any part of it, or any interest in it, by virtue of the eminent domain powers vested in the defendant and since the evidence failed to establish such interference with the property of the plaintiff as lawfully would constitute an appropriation.

7. As a matter of law the plaintiff failed to sustain the burden of proof on him to prove by competent evidence that the fair market value of his property was depreciated by reason of any flights of aircraft over or in the vicinity of his property.

8. The testimony of the plaintiff and his witnesses was too vague, uncertain and inaccurate to sustain a finding by the Viewers that the number of aircraft flying over or in the vicinity of the plaintiff's property interfered sufficiently with the property to constitute an appropriation.

9. The testimony of the plaintiff and his witnesses was too vague, uncertain and inaccurate to sustain a finding by the Viewers that the noise of aircraft flying over in the

vicinity of plaintiff's property or the vibrations caused by such aircraft interfered sufficiently with the property to constitute an appropriation.

[fol. 235] 10. If, as the plaintiff contends and the Viewers have ruled, there was an appropriation by the County on June 1, 1952, then all evidence of subsequent flights of aircraft would be inadmissible and should have been rejected by the Viewers.

11. The report and award of the Viewers were contrary to law inasmuch as under the facts alleged in plaintiff's Petition for Appointment of Viewers, the County of Allegheny cannot legally be held liable for the appropriation for public use of aviation rights, or easements over and across plaintiff's property.

12. The report and award of the Viewers were contrary to law inasmuch as, as a matter of law, the flights of aircraft over plaintiff's property were within the free navigable air space as declared by the United States of America.

13. The report and award of the Viewers were contrary to law inasmuch as, as a matter of law, if plaintiff has any claim for the appropriation of property, it is not against the County of Allegheny.

Wherefore, the County of Allegheny requests your Honorable Court to sustain its exceptions and to send the Reports of Viewers back with instructions to find according [fol. 236] to defendant's proposed Findings of Facts and Conclusions of Law.

* Maurice Louik, County Solicitor, Thomas J. Dempsey, Assistant County Solicitor, Attorneys for County of Allegheny.

IN THE COURT OF COMMON PLEAS

OPINION

Soffel, J.

This case comes before this Court on Exceptions filed both by plaintiff and defendant to certain Findings made by the Board of Viewers.

Briefly summarized, these are the facts:

The plaintiff filed a petition for the appointment of viewers alleging that aircraft of several airlines landing upon or taking off from the northeast runway of the Greater Pittsburgh Airport descended and ascended over plaintiff's property below the safe navigable air space as fixed pursuant to acts of Congress and that by reason of said low flights, the property of the plaintiff was greatly damaged and depreciated in value. The plaintiff further averred that the defendant by reason of its right of eminent domain has, in fact, appropriated for public use an easement or fee simple interest of the air space over the plaintiff's property. Following proceedings before the Board of Viewers, [fol. 237] a report was filed by the Board of Viewers in which it made certain Findings of Fact and Conclusions of Law.

The Board of Viewers found *inter alia* that on June 1, 1952, the County of Allegheny, defendant, condemned or appropriated a superterranean easement over plaintiff's property in Moon township with consequent damage to said property. Damages in the amount of \$12,690 were awarded the plaintiff.

This case is now before this Court on Exceptions to Findings of Fact and Conclusions made by the Board of Viewers.

Plaintiff's Exceptions are directed solely to the amount of damages awarded.

Defendant's Exceptions are directed to certain conclusions made by the Board of Viewers as not being legally warranted, and contrary to decisions of the Supreme Court, to-wit:

1. There was a taking of a superterranean easement over plaintiff's property by the County of Allegheny.

2. This taking occurred as of June 1, 1952.

The background of this case is fully set forth in the case of *Gardner v. Allegheny County*, reported at 382 Pa. 88 and 393 Pa. 120. The plaintiff in the instant case was one of the plaintiffs in the group of cases which went on appeal to the Supreme Court and were decided in the *Gardner* cases. In [fol. 238] these cases, the plaintiff, together with other property owners, brought action in equity against Allegheny County and certain airlines, alleging: 1) continuing trespasses over their properties, and 2) a taking of their respective properties. In the *Gardner* case at 382 Pa. 88, the Supreme Court sustained the County's preliminary objections as to the "taking of property" and continued the case with respect to an injunction for trespass. Subsequently, in the same cases reported in *Gardner v. Allegheny County*, 393 Pa. 120, the Supreme Court stayed the pending equity proceedings until the plaintiffs either proceeded under eminent domain or in actions of trespass. The decision in the *Gardner* case at 393 Pa. 120, was entered on June 3, 1958.

A few days prior to June 3, 1958, the plaintiff filed a petition for the appointment of viewers, out of which this action arises. The Board of Viewers filed a report in which it made certain Findings of Fact and Conclusions of Law.

The Findings of Fact made by the Board of Viewers included the following, submitted by defendant:

- "29. There is no evidence of any control exercised over any aircraft by the County of Allegheny.
30. All flights into and out of the Greater Pittsburgh Airport are regulated by the Civil Aeronautics Administration [fol. 239] of the United States of America.
31. No flights of aircraft have been shown to be in violation of any regulations of the Civil Aeronautics Administration.
32. No flights were shown to be lower than necessary for a safe landing or a safe taking-off."

The Board of Viewers also accepted the Finding of Fact submitted by defendant that "aircraft flew over plaintiff's property at indeterminate altitudes".

With respect to the question of damages, the Board of Viewers also made this Finding of Fact:

- "27. The plaintiff's expert real estate witness fixed the after-value of the plaintiff's property as affected by the alleged taking on May 15, 1952, which was prior to the time the airport was opened for commercial airline use and prior to the time the plaintiff complained of aircraft flights over or in the vicinity of his property."

The Board of Viewers in its discussion concluded that there was an act of dominion or condemnation by the County of Allegheny and found that:

"The 'taking' of the superterranean easement over the property of Griggs became effective on June 1, [fol. 240] 1952, at 12:01 A. M., by virtue of the Resolution of the Commissioners of Allegheny County dated May 27, 1952, designating that date and hour as the time for the opening of the Greater Pittsburgh Airport for public user. Consequently, the right to damages accrued at that time."

We shall consider the legal questions raised before this Court.

First: Did the Board of Viewers err in the amount awarded the plaintiff?

The Board of Viewers awarded the plaintiff damages in the sum of \$12690 for the taking of a superterranean easement. The plaintiff contends that the Board of Viewers was required to award damages upon the uncontradicted testimony of its real estate expert in the amount of \$35000. Plaintiff contends further that the Board failed to explain "usual procedure" or what method it used in arriving at damages in the aforesaid arbitrary amount.

The only testimony as to value was that produced by the plaintiff and his real estate expert. Plaintiff testified that the value of his property before taking was \$80000. The real estate expert, Mr. McDowell, a highly respected and exceptionally well qualified man in his field, testified that

the value immediately before the taking and as unaffected by the taking was \$75000 and that the value of the property [fol. 241] immediately after the taking as affected thereby was \$40000, or a diminution in value of \$35000.

Mr. McDowell was familiar with plaintiff's and other properties in the neighborhood for a long period of time prior to June 1, 1952, and possessed a detailed knowledge of sales and values in the vicinity. He had examined plaintiff's property immediately prior to that time and reasonably soon thereafter.

The defendant, County of Allegheny, offered no testimony on this or any other aspect of the proceedings.

Plaintiff contends that the Board of Viewers disregarded the testimony of its expert in making an award of \$12690, which includes detention money at six per cent.

Where, as in the case at bar, only one uncontradicted set of values was before the viewers and the damages awarded in no way appear related to that set of values, and where the only explanation for the variance between the two is vague and uninformative, it must be concluded that the viewers rejected in whole or in part the expert's testimony and considered other information in arriving at their conclusion. Since no other information is of record, it must be assumed that the viewers substituted their own judgment. [fol. 242] While the viewers were entitled, as are any triers of fact, to use the background of their knowledge and experience in evaluating the testimony of expert witnesses, *Leaf v. Pennsylvania Co.*, 268 Pa. 579, 112 A. 243 (1920), they were not entitled to throw away the only criteria given them in this case and substitute their own judgment based on matters not of record.

The question has been raised whether the plaintiff's action in filing an Exception to the Report of the Board of Viewers rather than taking an appeal from its decision is the correct course to be followed. We are of the opinion that it is. Questions of law are properly raised by exceptions to a viewer's report and questions of fact can only be raised by an appeal from such a report. *Lower Chichester Twp. v. Roberts*, 308 Pa. 195, 162 A. 460 (1932). *Appeal of Lakewood Memorial Gardens*, 381 Pa. 46, 112 A2d 135 (1955). The plaintiff has raised the issue of

whether the viewers could disregard the uncontradicted testimony of an expert witness in arriving at the amount of damages to be awarded, and this is clearly a question of law.

None of the cases cited by the plaintiff is in point factually, for they all involve situations in which the viewers or other fact-finding bodies when confronted with conflicting testimony, ignored that testimony and substituted their own judgment. In the case at bar, there is no conflicting testimony [fol. 243] relative to damages. The only testimony is that of the plaintiff and his expert witness. In the case at bar, the viewers did not admittedly ignore the testimony of the expert and substitute their own judgment but rather gave no explanation for the award they made other than the cursory explanation that the damages had been measured by the "usual procedure".

Despite these factual differences, the principles governing the cited cases and the instant case are the same. Triers of fact, whether judges, jurors, viewers, boards or commissions, must render their verdict, finding or award based on the testimony or other evidence presented. The fact-finding body cannot substitute for that testimony or evidence its own knowledge or belief, no matter what extraneous matter that knowledge or belief is based upon. *Cowan v. Bunting Glider Co.*, 159 Pa. Super. 573, 49 A2d 270 (1946); *Flower v. Baltimore and Phila. Railroad Co.*, 132 Pa. 524, 19 A. 274 (1890); *Avins v. Commonwealth*, 379 Pa. 202, 108 A2d 788 (1954).

We are of the opinion that plaintiff's Exceptions to the award of damages should be sustained. We believe the question of the amount awarded should be referred back to the Board of Viewers for reconsideration and discussion of the factors upon which the award was predicated.

We come now to a consideration of the issues raised by the defendant.

[fol. 244] The defendant contends, first, that the legal conclusion of the Board of Viewers that there was a "taking" of plaintiff's property by the defendant is not legally warranted under the Findings of Fact which it made. The defendant cites specifically these Findings of Fact:

29. There is no evidence of any control exercised over any aircraft by the County of Allegheny.
30. All flights into and out of the Greater Pittsburgh Airport are regulated by the Civil Aeronautics Administration of the United States of America.
31. No flights of aircraft have been shown to be in violation of any regulations of the Civil Aeronautics Administration.
32. No flights were shown to be lower than necessary for a safe landing or a safe take-off.

In addition, the defendant cites the Finding as submitted by the plaintiff and accepted by the Viewers that, "aircraft flew over plaintiff's property at indeterminate altitudes."

These Findings, says the defendant, support the conclusions that all flights of aircraft over plaintiff's property were lawful and within the navigable air/space appropriated by the Federal government. As a result, if there was a [fol. 245] "taking" of the plaintiff's property it was by the United States and not by the defendant in this action. The defendant refers us to the Air Commerce Act of May 20, 1926, c. 344 §6, 44 Stat. 572, 49 U.S.C.A. §176(a), which states:

"The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above all inland waters and the air space above those portions of the adjacent marginal high seas, bays and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction."

This declaration was implemented by the passage of the Civil Aeronautics Act of June 23, 1938, c. 601 Title I §3, 52 Stat. 980, 49 U.S.C.A. §401 et seq., which states in §403:

"There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States."

This same Act, which empowered the Civil Aeronautics Authority to carry out its provisions defined "navigable air space" as "air space above the minimum altitudes of flight prescribed by regulations issued under this chapter." (§401-24)

[fol. 246] The Civil Aeronautics Board has specifically defined the minimum altitudes of flight over both rural and urban areas. It has not defined the minimum safe altitudes for use in landing and taking-off. The defendant seeks to bridge this gap in the Civil Aeronautics Regulations by quoting the following excerpts from the first *Gardner* case, 382 Pa. 88, at page 108:

"Regulation 60.17 defines and prescribes the air space appropriated for take-offs and landings, if at all, only negatively and by implication.

... However, since take-offs and landings are obviously absolutely necessary if there are to be interstate flights, or indeed if there is to be any flying at all, reason and common sense impel the conclusion that Congress must have intended the Federal Agencies to have the right and power to prescribe and appropriate for public use such air space as is reasonably necessary for take-offs and landings. This naturally will vary with terrain, wind conditions and other factors and consequently it is difficult and may be impractical and unwise to attempt to more particularly define such air space."

As a buttress for the logic expressed in the above quotation the defendant also refers this Court to Civil Air Regulation No. 60, interpretation No. 1, adopted by the Civil Aeronautics Board on July 22, 1954, which read, in part, as follows:

"... Directly involved is the question whether the air-space which lies at and above the flight path of aircraft making normal take-offs and landings comes within the term "navigable airspace" as defined in the Civil Aeronautics Act. If it does, a public right of freedom of transit is recognized and proclaimed to exist for citizens of the United States by Section 3 of that Act.

... In consideration of the foregoing, the Board construes the words, 'Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes' where such words appear in §60.17 of the Civil Air Regulations, as establishing a minimum altitude rule of specific applicability to aircraft taking off and landing. It is a rule based on the standard of necessity, and applies during every instant that the airplane climbs after take-off and throughout its approach to land. Since this provision does prescribe a series of minimum altitudes within the meaning of the Act, it follows, through the application of §3, that an aircraft pursuing a normal and necessary flight path in climb and after take-off or in approaching to land is operating in the navigable airspace."

[fol. 248] The plaintiff contends that the paths of flight over his property taken by the planes in landing and taking-off were not within the minimum safe altitudes of flight and thus not within the navigable air space pre-empted by the Federal government. The plaintiff relies principally on *United States v. Causby*, 328 U.S. 256, 90 L. Ed. 1206 (1945), which involved the same legal issue which is now before this Court. The plaintiff emphasizes the basic question to be that stated by the Viewers in its Report, page 6, to-wit:

"Is the County of Allegheny liable to T. N. Griggs as the result of the exercise of its power of eminent domain in the location, laying out and opening of Greater Pittsburgh Airport?"

An analysis of the cases cited by both parties leads us to believe that the arguments of the plaintiff must prevail. Reference to the pre-emption of air space within the glide path of planes landing and taking-off is contained only in the dicta of the Pennsylvania Supreme Court in the first *Gardner* case and is not determinative of the law. Similarly, the Civil Aeronautics Regulation, Interpretation No. 1, was issued after the alleged "taking" in this case. The law as stated in the *Causby* case, *supra*, is clear—328 U.S. at page 263:

"The fact that the path of glide taken by the planes was that approved by the Civil Aeronautics Authority [fol. 249] does not change the result. The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 USCA §180, 10A FCA Title 49, §180. If that agency prescribed 83 feet as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done. The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace. The minimum prescribed by the authority is 500 feet during the day and 1000 feet at night for air carriers (Civil Air Regulations, Pt. 61 §61.7400, 61.7401, Code Fed. Reg. Cum. Supp. title 14, c 1) and from 800 feet to 1000 feet for other aircraft depending on the type of plane and the character of the terrain. Ibid, Pt. 60 §60.350-60.3505. Fed. Reg. Cum. Supp., supra. Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the [fol. 250] United States concedes, as we have said, that in that event there would be a taking. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them—the minimum safe altitudes of flight.

... As we have said, the flight of airplanes, which skim the surface but do not touch it is as much an appropriation of the use of the land as a more conventional entry upon it.

... The superadjacent airspace as this low altitude is so close to the land that continuous invasions of it

affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface."

In the *Causby* case the government raised the very same questions that the defendant is now seeking to raise here; namely, (1) the government did not take property in using the air space over the land; (2) since the Federal government has asserted control over the use of air space by aircraft, there was no "taking;" (3) that the flight of the aircraft was within the navigable air space as defined by [fol. 251] the statutes and regulations and such flights were an exercise of the declared right of travel through that air space. The law as thus stated in the *Causby* case, *supra*, effectively disposed of those questions and likewise the questions which the defendant raises here.

See also *Highland Park, Inc. v. United States*, 161 F. Supp. 597; *Freeman v. United States*, 167 F. Supp. 541; *Cravens v. United States*, 163 F. Supp. 309; *Adaman Mutual Water Company v. United States Court of Claims*, decided October 8, 1958; *Ralph Dick et al. v. United States*, 169 F. Supp. 491; *Hopkins v. United States*, 173 F. Supp. 245 (Advanced report-July 13, 1959); and *United States v. Ashcraft, et al.*, 176 F. Supp. 447 (Advanced report—October 26, 1959). These cases uniformly recognize that the government has not appropriated the space necessary to land and take off.

In the *Ashcraft* case cited *supra*, Judge Yankwich makes this pertinent observation—p. 448:

"... Regardless of any congressional limitations, the land owner as an incident to his ownership, has a claim to the superadjacent airspace at such altitude as interferes with his enjoyment of the property and 'that invasions of it are in the same category as invasions of the surface.' *United States v. Causby*, 1946, 328 U.S. 256, 265, 66 S. Ct. 1062, 90 L. Ed. 1206."

[fol. 252] The defendant concludes that, by reason of the fact that low flights are not in violation of the Civil Aeronautics Authority regulation and that they are not lower

than necessary for safe landing or taking off, they are lawful and within the navigable air space appropriated by the United States of America. The answer to this assumption is:

1. The flights are lawful only if there has been a "taking" of the plaintiff's property and just compensation paid for it; and
2. The *Causby* case decides such flights are not within the minimum safe altitude of flights within the meaning of the statute.

Reduced to its simplest terms the contention of the defendant is that the regulations of a Federal agency can extinguish private property rights and that such is also the view of the Civil Aeronautics Authority which promulgates the regulation. It is submitted that the regulation of a Federal agency and that agency's interpretation of its regulation cannot be the law of the land. Private property rights are determined by the law of the state in which it is located and cannot be acquired for public use except in the manner provided by law.

[fol. 253] We therefore conclude, as did the viewers by implication, that the flights of aircraft over the land of the plaintiff were not within the navigable air space as defined by Federal regulations and were not operated over or in an easement which the Federal government had previously "taken."

This conclusion is not in conflict with Findings of Fact Nos. 29, 30, 31 and 32 as made by the Viewers. Lack of control over the aircraft by the defendant (Finding of Fact No. 29) in no way affects or is related to our conclusion. The same must be said of Finding of Fact No. 30. Finding of Fact No. 31, that no flights were shown to be in violation of the regulations of the Civil Aeronautics Administration, is not inconsistent with the conclusion that the flights were not within the navigable air space; the regulations in effect at the time the flights were made did not define a minimum safe altitude or navigable air space, so that it was entirely possible for those flights to be in accordance with the existing regulations and still not within the

navigable air space as discussed in the *Causby* case. Finding of Fact No. 32, that no flights were shown to be lower than necessary for safe landing or a safe take-off, can be reconciled with the conclusion in the same manner.

There remains but one question to be resolved: Do the Findings of Fact support the conclusion that there was a [fol. 254] "taking" by the defendant? The general principle of law that there is liability for interference by aircraft with the air space above property is found in this excerpt from *Crew v. Gallagher*, 358 Pa. 541, 58 A. 2d 179 (1948), at page 547:

"Although the Aeronautical Code of May-25, 1933, P. L. 1001, and the Air Commerce Act of 1926 . . . diminish the absolute rights that landowners had to the space above the surface of their land under the common law, they do not authorize the flight of aircraft at such low altitudes as to interfere with the reasonable use and enjoyment of the land. See *United States v. Causby*, 328 U. S. 256 . . . After the establishment of a regular flight traffic pattern, if airplanes fly very close to plaintiffs' building, or in any other way cause real damage to plaintiffs' property adequate relief in equity will be available . . ."

In *Dlugas et ux. v. United Air Lines*, 43 D & C 402, the law is thus stated:

"It may be observed in concluding . . . that the A.L.I. Restatement of the Law of Torts, §194, considers flights of aircraft over the lands of another to be privileged only if at a height so as not to interfere unreasonably [fol. 255] with the possessor's enjoyment of the surface and the air space above it."

Under these statements of the law, and under the facts found by the Viewers, there was an unreasonable interference with the plaintiff's enjoyment of the surface of his land and the airspace above it, and that interference constituted a "taking" by the defendant.

The defendant asserts, however, that the liability of the defendant can be established only if it is shown that the

flights were unlawful, relying on the language in the *Gardner* cases. It further asserts the Findings of Fact cited above lead inevitably to the conclusion that all flights were lawful and were in conformity with the regulations of the Federal agency. Again we must point out that the discussion in the *Gardner* cases of what flights give rise to a cause of action is dicta and not determinative of the issues here. Therefore, we believe that the Findings of Fact made by the Viewers and their conclusion that there was a "taking" are entirely consistent under the law as stated in the cases cited.

The defendant has also excepted to the Viewers' Finding that the "taking" of plaintiff's property occurred on June 1, 1952, the date the airport was opened to public use. They assert that such a finding is in conflict with the decisions of the Supreme Court in both *Gardner* cases, *supra*, and [fol. 256] that to determine that a "taking" took place by reason of the mere opening of the airport is to completely disregard the Supreme Court's holding that the nature, character, frequency and permanency of the flights must be considered.

It appears to be correct that on June 1, 1952, no flights in or out of the airport had taken place and certainly no definite flight pattern had developed. The dimensions of the flight pattern, about which the plaintiff complains, were developed only after the facilities were in use and many landings and take-offs had been made. To this extent the "taking" by the County could have occurred only after the nature, character, frequency and permanency of the flights were definitely ascertained.

The Viewers were faced, however, with the problem of fixing a date when the "taking" took place, and in their search for a solution to this problem they chose the only certain date available to them, The date of the opening of the airport. The only other alternative was to choose a later date at random, after first finding that a sufficient number of flights had been made to provide a detailed picture of the air traffic. This choice, however, would only have served to push the problem facing the Viewers one step further away, for they would then be called upon to determine at what hour on what day the flight pattern which constituted the "taking" crystallized.

[fol. 257] The Viewers made the only definitive choice. They did not arbitrarily choose June 1, 1952, at the outset of the hearings and before testimony as to the nature and frequency of the flights was introduced and then go on to provide their calendar skeleton with the flesh of testimonial detail. Rather, the Viewers heard all testimony concerning the landings and take-offs, determined from that testimony that there had been a "taking," and then ascribed a date to that "taking" which was definite and logical. Under these circumstances, we do not believe that the testimony as to the nature, character, frequency and permanency of the flights, even though it related to flights after June 1, 1952, is either irrelevant or immaterial as defendant contends.

We believe plaintiff's exception to the award of the Viewers should be sustained and defendant's exceptions dismissed.

IN THE COURT OF COMMON PLEAS

ORDER OF COURT REFERRING MATTER BACK TO BOARD OF
VIEWERS—February 10, 1960

And Now, to-wit, February 10, 1960, it is ordered, adjudged and decreed that plaintiff's exception to an award by the Viewers in the amount of \$12,690 be sustained. It is further directed that this matter be referred back to the Viewers for reconsideration and action as defined in this opinion.

[fol. 258] It is also ordered, adjudged and decreed that defendant's exceptions to Findings of Fact made by the Viewers be dismissed.

By the Court, Soffel, J.

Et die exception noted and bill sealed.

Soffel, J. [Seal]

IN THE COURT OF COMMON PLEAS

SUPPLEMENTAL REPORT OF VIEWERS—Filed March 2, 1960

Conforming to your Honorable Court's direction to reconsider and discuss the factors upon which the Board of Viewers predicated its opinion of the amount of damages awarded to plaintiff, the members respectfully state:

That they viewed the property on June 24, 1958, but due to time of day and wind conditions no flights of aircraft were observed using the runway glide angle affecting said property. However, on subsequent visits to the property for observation and after "views" of other "takings" for airport navigational, runway and general purposes they observed and heard flights of single and multi-engine aircraft over plaintiff's property in the glide angle for both take-off and let-down at times of heavy and light to moderate air traffic.

[fol. 259] That during the numerous observations and subsequent thereto they concerned themselves with the effect of flights on plaintiff's property considering, inter alia, the frequency of low-flying and the attendant proximity damages such as fear of disaster, noise, vibration, anxiety and general interference with the peaceful and quiet enjoyment of the property by the owner Griggs as previously assigned in recorded Report of Viewers, which unfortunately was unavailable to the Court at argument and decision time due to misfiling and misplacing.

That since 1955 they have viewed, heard valuation testimony of expert witnesses and made damage awards and benefit assessments on upwards of 200 properties condemned for Airport purposes as well as those for highway, petroleum pipelines and water line construction in the general and immediate vicinity of plaintiff's property.

That they have familiarized themselves with sales and holding prices of property in the general area of the Airport; the topography, airport and township zoning, road locations, commercial and residential areas; locations of market places, churches and their denominations, schools, police and fire facilities, transportation; all available printed material by the U. S. government, the airplane in-

dustry and real estate appraisers relating to effect of airport approach on neighboring properties; and authoritative [fol. 260] books treating on flight procedure for aircraft take-off and let-down, the frequency of motor failure and the percentage of resulting disastrous effects, navigational problems, and other pertinent information.

All of the foregoing factors, including the "Findings of Facts" are basic to and part of the Viewers Report (Supra)

DISCUSSION

Viewers are freeholders who are sworn to report damages or benefits, as the case may be, to the appointing Court. In the performance of this duty they

"may resort to any source of information which the members of it may think proper—even the evidence of their senses";

Spring Garden Streets Case 4 Rawle 192

They examine the property and observe the nature and quantity of land affected and are directed by the statutes to hear witnesses, if any appear after due notice. Their powers and duties are as an "inquest" (Patten v. The Susquehanna R. R., 1 Pearson 48, 49, 51 & 53) at common law and no statutory or judicial limitation has ever curtailed or threatened to curtail those investigatory and fact finding duties until the unprecedented restraint first appearing in Cowan v. Bunting Glider Co., 159 Pa. Super. 573, later [fol. 261] adopted by the Supreme Court in Avins v. Commonwealth, 379 Pa. 202 at 205:

"The limitation upon the triers of fact in condemnation cases with respect to the permissible source of their information is the same whether they be 'judges, jurors, viewers, boards or commissions'."

At the hearings whether on In Limine Petition (Powell Appeal, 385 Pa. 467, 474; Petition of Wynn, Common Pleas of Allegheny County, 739 Jan. 1957 affirmed 188 Pa. Super. 499) or on regular petition the Viewers follow trial procedure of the Courts for

"it is implicit that a jury of view must decide all relevant questions of law or fact before it can competently make an award of damages or assessment of benefits: see case of the Germantown and Perkiomen Turnpike Road Company, 4 Rawle 191 . . . ' (The Viewers) were bound to dispose, in the first instance, of all the matters committed to them, whether constituted of law or of fact, subject however to review by the Sessions.' "

Gardner v. Allegheny County, 393 Pa. 120, 130 (1958)

Witnesses are heard and their competency and the weight and relevancy of their testimony is determined. In the instant case the Viewers heard Mr. McDowell, plain-[fol. 262] tiff's real estate expert, both on direct and cross-examination, individually cognizant of his excellent reputation as a citizen and exceptional qualifications. His opinion was neither impeached nor contradicted. The County of Allegheny offered not a scintilla of evidence except to supply documents on request of plaintiff or the Viewers. It "rested" after conclusion of plaintiff's case.

During the Viewers deliberations it was evident to the Chairman that the members could not accept witness McDowell's estimate of damage. Notwithstanding the case of Avins v. Commonwealth (Supra), and relying on the existing law of Spring Garden Streets Case (Supra) supplemented by Crumrine v. Washington County Housing Authority, 376 Pa. 234, at (238)

"Opinion testimony may be of value and it may be of no value, just as it appeals to the jury. In all such matters the jury must be left to the free exercise of its own judgment. It cannot be bound by the opinion of the witnesses or the instruction of the Court. It may reject in toto or in part the opinion of any witness it disbelieves, and this whether that opinion is contradicted or not"

the Chairman advised the Board Members that under those circumstances they should arrive at an amount which in [fol. 263] their opinions would be just compensation.

It is most respectfully submitted that the Viewers have given this case their most careful and thoughtful consideration both as to law and facts; and, after additional reconsideration, they herewith advise your Honorable Court that not one has deviated in his opinion as to amount of just compensation awarded to the plaintiff.

T. P. Trimble, Jr., Thos. M. Conrad, Paul G. McAtee,
Viewers.

IN THE COURT OF COMMON PLEAS

OPINION— Filed March 8, 1960

Per Curiam

This case came before the Court on Exceptions to the Report of the Board of Viewers awarding damages in the sum of \$12,600 to the plaintiff for the taking of a superterranean easement above plaintiff's property. The plaintiff filed one exception directed to the amount of damages awarded. The defendant filed exceptions attacking, inter alia, the jurisdiction of the Court. After hearing the argument of both sides and examination of briefs, the Court dismissed defendant's exceptions and sustained the plaintiff's exception. In its Opinion, the Court said: "We believe the question of the amount awarded should be referred back to the Board of Viewers for reconsideration and discussion of the factors upon which the award was predicated." The case was then sent back to the Board of Viewers which was directed to reconsider and state the factors which it considered in making the award. This requirement has now been met in its Supplemental Report.

At the time this case was argued before the Court en Banc, the Court was not informed that the Board of Viewers had supported its award by a written report setting forth Findings of Fact and Conclusions of Law. This report was not discussed by counsel, nor was it presented to the Court. This Report has since been examined. In accord with the Court's directions, the Board of Viewers has now filed a Supplemental Report. This sets forth in detail the view of the property by the Viewers, their observations

on the ground of the effect of flights on plaintiff's property, and the law applicable to a Board of Viewers in awarding damages or benefits.

Based on the original report of the Board of Viewers filed in this case and its supplemental report filed as directed by the Court, we are of the opinion that the plaintiff's exception must now be dismissed.

[fol. 20']

IN THE COURT OF COMMON PLEAS

ORDER OF COURT DISMISSING EXCEPTION TO REPORT OF
BOARD OF VIEWERS—March 8, 1960

And Now, to-wit, March 8, 1960 it is Ordered, Adjudged and Decreed that the Exception of the plaintiff to the Viewers' award be and it is hereby dismissed.

Per Curiam, W. McNaugher, Sara M. Soffel, Weiss.

Eo die, exception noted to the plaintiff, and bill sealed.

W. McNaugher [Seal], Sara M. Soffel [Seal],
Weiss [Seal].

[fol. 321]

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

No. 155 March Term, 1960

THOMAS N. GRIGGS

v.

COUNTY OF ALLEGHENY, Appellant

DOCKET ENTRIES

Appeal from the order entered February 10, 1960, of the Court of Common Pleas of Allegheny County at No. 2384 July Term, 1958.

March 7, 1960, Appeal and affidavit filed and writ exit, returnable last Monday of September, 1960.

March 9, 1960, Appearance for appellee, filed.

September 22, 1960, Record filed at No. 158.

September 29, 1960 Argued.

Decision

January 16, 1961

The order dismissing the County's exceptions to the viewers' report is reversed with directions that the viewers' report be vacated and set aside.

Jones, C. J.

Mr. Justice Bell files a Dissenting Opinion in which Mr. Justice Eagen joins.

January 25, 1961, Petition for reargument, filed.

February 6, 1961, Answer filed.

Order

Before Jones, C. J., and Bell, Musmanno, B. R. Jones, Bok and Eagen, JJ. (Cohen, J. absent).

February 15, 1961, reargument refused.

Per Curiam.

February 16, 1961 Remitted.

[fol. 322] March 23, 1961, Petition to return record pending action by the Supreme Court of the United States, filed.

March 23, 1961, Notice of appeal to Supreme Court filed.

Order

March 23, 1961, prayer of within petition granted.

By the Court
Jones, Chief Justice.

March 24, 1961, Supplemental Writ exit.

March 24, 1961, Record returned to this office.

For Appellant: Maurice Louik, County Solicitor, Francis A. Barry, First Asst., John W. Mamula, Second Assistant.

For Appellee: William A. Blair, David B. Fawcett.

[fol. 323]

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

No. 158 March Term, 1960

THOMAS N. GRIGGS, Appellant

v.

COUNTY OF ALLEGHENY

DOCKET ENTRIES

Appeal from the orders of February 10, 1960, and March 8, 1960, of the Court of Common Pleas of Allegheny County at No. 2384 July Term, 1958.

March 9, 1960, Appeal and affidavit filed and writ exit, returnable last Monday of September, 1960.

March 16, 1960, Appearance for appellee, filed.

September 22, 1960, Record and 2 volumes of testimony, filed.

September 29, 1960 Argued.

Decision

January 16, 1961

Appeal is dismissed.

Jones, C. J.

Mr. Justice Bell files a Dissenting Opinion in which Mr. Justice Eagen joins.

January 25, 1961, Petition for reargument, filed.

February 6, 1961, Answer filed.

Order

Before Jones, C. J. and Bell, Musmanno, B. R. Jones, Bok, and Eagen, JJ. (Cohen, J. absent).

February 15, 1961, reargument refused.

Per Curiam.

February 16, 1961 Remitted.

March 23, 1961, Petition to return record pending action by the Supreme Court of the United States, filed.

Order

March 23, 1961, Prayer of within petition granted.

By the Court

Jones, Chief Justice.

[fol. 324] March 24, 1961, Supplemental Writ exit.

March 24, 1961, Record returned to this office.

For Appellant: William A. Blair, David B. Fawcett.

For Appellee: Maurice Louik, County Solicitor, Francis A. Barry, First Asst., John W. Mamula, Second Asst.

[fol. 325]

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

Nos. 155 and 158 March Term, 1960

No. 155—Appeal of County of Allegheny

No. 158—Appeal of Thomas N. Griggs

THOMAS N. GRIGGS, Appellant,

v.

COUNTY OF ALLEGHENY, Appellant.

Appeals from Orders of the Court of Common Pleas
of Allegheny County at No. 2384 July Term, 1958.

OPINION OF THE COURT—Filed January 16, 1961

Jones, C. J.

These appeals grow out of a viewers' proceeding instituted by the plaintiff as owner of land neighboring the Greater Pittsburgh Airport to recover damages from the County of Allegheny, the owner and operator of the airport, for an alleged appropriation of the plaintiff's land because of a substantial interference with the use and enjoyment of it caused by flights of aircraft at low altitudes, through the air space above the land, when taking off or landing at the airport.

The Greater Pittsburgh Airport was opened for commercial air travel on June 1, 1952. At that time, Thomas N. Griggs, the plaintiff, was the owner of a nearby tract of land containing 19.161 acres improved with a house, two cottages, a four-car garage with living apartment overhead, and certain outbuildings. Part of the Griggs property lay under an "approach area" for the airport's northeast-southwest runway.

On May 29, 1958, Griggs petitioned the Court of Common Pleas of Allegheny County for the appointment of viewers to assess the damages caused by an alleged taking of his land by the County of Allegheny on June 1, 1952. The petitioner averred that, since the opening of the airport for commercial use, aircraft of several air lines, upon [fol. 326] taking off and landing at the airport, have frequently and continuously flown through the air space above his land at an elevation of less than 500 feet; that as the result of such flights, "the use and enjoyment of [his] property have been interfered with by reason of the possible danger of the low flights, the noise and vibrations which they cause, their lights pointing at the premises at night time and interference with sleep and rest"; and that the property has been thereby "greatly damaged and depreciated in value."

The court appointed a board of view which sat for the purpose of its appointment, heard testimony offered by the claimant, and awarded him damages in the sum of \$12,690. Griggs filed exceptions to the viewers' report alleging that the viewers had unlawfully disregarded the expert testimony adduced by him as to the damages to his property which was the only testimony offered before the viewers on that issue. He also appealed the award to the Court of Common Pleas of Allegheny County where the question of damages would be heard *de novo*. The County, contending that it was not liable for any damage allegedly suffered by the claimant, offered no testimony before the Board of Viewers on the issue of property value. The County filed exceptions to the viewers' award to Griggs setting forth therein that, based upon the viewers' findings of fact, there was no taking of Griggs' property by the County. The court below dismissed all exceptions of both parties from which action each of the parties took an appeal to this court pursuant to Section 2623 of the Second Class County Code of July 28, 1953, P.L. 723, 16 P.S. §5623.

It is clear that a property owner may petition the court for the appointment of viewers to assess and award damages against an entity clothed with the power of eminent domain where such entity effects a "taking" of the pe-

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tioner's property whether or not the appropriator has followed the statutorily provided condemnation procedure. [fol. 327] *Rosenblatt v. Pennsylvania Turnpike Commission*, 398 Pa. 111, 126-127, 157 A.2d 182; *Philadelphia Parkway*, 250 Pa. 257, 264-265, 95 Atl. 429; *Barron's Use v. United Railway Co.*, 93 Pa. Superior Ct. 555, 557-558. A "taking" occurs when the entity clothed with the power of eminent domain substantially deprives an owner of the beneficial use and enjoyment of his property. *Miller v. Beaver Falls*, 368 Pa. 189, 196-197, 82 A.2d 34; *Creasy v. Stevens*, 16 Fed. Supp. 404, 410-412.

Paragraph 12 of Griggs' petition for the appointment of viewers admits that the county has not condemned his land by way of the statutorily authorized procedure.¹

What the claimant attempted to show at the hearing before the viewers was that the county had substantially deprived him of the beneficial use and enjoyment of his property. Assuming, for present purposes, that he has shown a substantial deprivation of the beneficial use and enjoyment of his property, we shall proceed at once to a consideration of the basic question raised by the county's appeal as to whether such deprivation was, as a matter of law, caused by the County of Allegheny.

The County, relying on findings of fact by the viewers that no flights of aircraft were shown to be in violation of any regulation of the Civil Aeronautics Administration and that no flights were shown to be lower than necessary for a safe landing or take-off, contends that all of the complained of flights were through air space which the United States Congress placed within the public domain and that, therefore, any taking of Griggs' property was by the federal government and not by the County of Allegheny.

[fol. 328] Section 10 of the Air Commerce Act of May 20, 1926, 44 Stat. 568, as amended, 49 U.S.C.A., §180, provides as follows: "As used in this Act, the term 'navigable air-

¹ Section 14 of the Airport Zoning Act of April 17, 1945, P.L. 237, 2 P.S. §1563, confers upon political subdivisions the power to condemn air aviation easements and other estates in property for the purpose of providing approach protection for aircraft.

space' means airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority, and such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of said sections."

Section 3 of the Civil Aeronautics Act of June 23, 1938, 52 Stat. 973, 49 U.S.C.A., §403, states that "There is recognized and declared to exist in behalf of ~~any~~ citizen of the United States a public right of freedom of transit in air commerce through the *navigable air space* of the United States." [Emphasis supplied.]

Section 1 (24) of the Act, 49 U.S.C.A., §401 (24), defines "navigable air space" as follows: "'Navigable air space' means air space above the minimum altitudes of flight prescribed by regulations issued under this Act."

Pursuant to authority granted by the Civil Aeronautics Act of 1938, the Civil Aeronautics Board issued Civil Air Regulations (14 C.F.R., Parts 1-190). Among these Regulations, Section 60.17, Part 60 (Air Traffic Rules), which establishes minimum safe altitudes of flight at 1000 feet over congested areas and 500 feet over other than congested areas, is prefaced with the following: "Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes:". The County of Allegheny contends that this exception means that minimum safe altitudes of flight for take-offs and landings have been established at the heights necessary for these purposes.² The County concludes, therefore, [fol. 329] that the "navigable air space" which Congress placed within the public domain includes all air space needed by an airplane for take-off or landing.

While the conclusion has the rationale of reality to support it, we are precluded from adopting it by the Supreme Court's interpretation of similar regulations in *United States v. Causby*, 328 U.S. 256 (1946). The decision in that case upheld the claimant's right to damages from the United States for a taking of certain of his

² This is now the position of the Civil Aeronautics Board. Civil Air Regulations, Interpretation 1, 19 F.R. 4602, July 27, 1954.

property located near an airport because of a substantial interference with his use and enjoyment of it by low flights of U. S. military planes, when taking off from or landing at the airport. In answer to an argument similar to that which the County of Allegheny makes here, the Supreme Court said (at pp. 263-264), "The fact that the path of glide taken by the planes was approved by the Civil Aeronautics Authority does not change the result. The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C., sec. 180. If that agency prescribed 83 feet [the height at which the planes passed over Causby's land] as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done. The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace. The minimum prescribed by the Authority is 500 feet during the day and 1,000 feet at night for air carriers (Civil Air Regulations, Pt. 61, sections 61.7400, 61.7401, Code Fed. Reg. Cum. Supp., Tit. 14, ch. 1), and from 300 feet to 1,000 feet for other aircraft, depending on the type of plane and the character of the terrain. *Id.* Pt. 60, sections 60.350-[fol. 330] 60.3505, Fed. Reg. Cum. Supp., *supra*. Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them—the minimum safe altitudes of flight."²

² The Supreme Court of Washington recently rejected the identical argument, based upon Section 60.17, Part 60, of the Civil Air

Thus, the Supreme Court has held that the navigable air space which Congress placed in the public domain does not include the path of glide for an airplane's take-off or landing. As we are, of course, bound by the Supreme Court's interpretation of the federal statutes involved, we are, perforce, required to reject the County's contention that navigable air space, as employed by Congress, includes the area necessary for an airplane's take-off or landing in safety.*

[fol. 331] But, even though the complained of flights were not through air space which was part of the public domain, the record does not show that the County of Allegheny was the efficient legal cause of any damage resulting from the flights. Griggs testified at the hearing before the viewers that the airplanes of several commercial airlines flew over his land at low altitudes. But, he offered no proof, however, that any of these planes were owned by the County of Allegheny or operated by its agents. Indeed, the viewers found as a fact that "There is no evidence of any control exercised over any aircraft by the County of Allegheny." That finding, supported as it is by the record, precludes the claimant from recovering against the County in this proceeding.

In unwarrantedly awarding damages to Griggs, the viewers relied upon a finding of fact that the County, in

Regulations, that the County of Allegheny is now pressing upon us, quoting this paragraph from *United States v. Causby*, supra. *Ackerman v. Port of Seattle*, 348 P.2d 664 (1960).

*Congress moved to counteract the effect of the decision in *United States v. Causby*, supra, by enacting the Federal Aviation Act of August 23, 1958, Pub. L. 85-726, 72 Stat. 731, 49 U.S.C.A., §1301 et seq., Section 1401(b) whereof repealed the Civil Aeronautics Act of 1938. Section 104 of the later Act, 49 U.S.C.A., §1304, provides that, "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." And, Section 101 (24), 49 U.S.C.A., §1301 (24), declares that (as used in the Act), "'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." [Emphasis supplied.]

compliance with rules and regulations of the Civil Aeronautics Authority, drafted a "Master Plan" showing an "approach area" over part of Griggs' property, which plan was submitted to and approved by the Civil Aeronautics Authority. But the drafting, submission, and approval of the plan did not give the County an easement of aviation over Griggs' property, nor was any evidence offered to show that such action deprived Griggs of any use and enjoyment of his property, substantially or otherwise.

It is true that in *United States v. Causby*, supra, the United States was held to have effected a taking of certain property neighboring an airport. But there the United States owned and its agents operated the aircraft which caused the deprivation of the owner's use and enjoyment of the neighboring property. The airport itself was owned by the Greensboro-High Point Municipal Authority, which had leased to the United States Government the right to use the field "concurrently, jointly, and in common" with other users. The Supreme Court in the *Causby* [fol. 332] opinion did not indicate who actually maintained and operated the airport, evidently considering this point irrelevant.

For Griggs to make use of *United States v. Causby*, supra, as a precedent, it would seem that he should look for relief to the owners or operators of the aircraft which have made the complained of flights through the air space above his land. Such relief is contemplated by Section 403 of the Aeronautical Code of May 25, 1933, P.L. 1001, 2 P.S. §1469, which provides, in part, as follows: "The owner and the pilot, or either of them, of every aircraft which is operated over the lands or waters of this Commonwealth, shall be liable for injuries or damage to persons or property on or over the land or water beneath, caused by the ascent, descent, or flight of aircraft, or the dropping or falling of any object therefrom, in accordance with the rules of law applicable to torts on land in this Commonwealth."

Commercial air lines are not, of course, clothed with the power of eminent domain and cannot, therefore, be pro-

ceeded against by a complaining land owner through a viewers' proceeding for the assessment of damages for a taking of his property.

In view of our conclusion herein that there has been no taking of the plaintiff's property by the County of Allegheny in the particulars complained of, and that, consequently, the County is not liable to the plaintiff for any deprivation of the use and enjoyment of his property by airplanes utilizing the Greater Pittsburgh Airport, the question raised by the plaintiff's appeal has become moot.

The order dismissing the County's exceptions to the viewers' report on appeal at No. 155 is reversed with directions that the viewers' report be vacated and set aside.

Plaintiff's appeal at No. 158 is dismissed.

Mr. Justice Bell files a dissenting opinion in which Mr. Justice Eagen joins.

[fol. 333]

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

Nos. 155 and 158 March Term, 1960

THOMAS N. GRIGGS

v.

COUNTY OF ALLEGHENY

Appeal of Thomas N. Griggs from the Order of the Court of Common Pleas of Allegheny County of March 8, 1960 at No. 2384 July Term, 1958.

Appeal of County from the Order of the Court of Common Pleas of Allegheny County of February 10, 1960, at No. 2384 July Term, 1958.

DISSENTING OPINION—Filed January 16, 1961

Bell, J.

In *Gardner v. Allegheny County*, 382 Pa. 88, 114 A. 2d 491, the Court analyzed and reviewed at length a number of the problems arising out of flight of aircraft over privately owned lands and held inter alia (page 116): first,

"It is clear as crystal under the authority of *United States v. Causby* [328 U.S. 256] that flights over private land which are so low and so frequent as to be a direct and immediate interference with the enjoyment and the use of the land amount to a 'taking'." And secondly, that a Court of Equity has no power or jurisdiction to assess damages for a taking, but damages for property taken, injured or destroyed lies in proceedings before the Board of View. In that decision we did not decide who were proper defendants. The plaintiff, relying on the *Gardner* case, brought proceedings before the Board of View and proved that the flights were so low and so frequent as to be a direct and immediate interference with the enjoyment and the use of his land and hence amounted to a taking for which he was entitled to recover damages in eminent domain proceedings before the Board of View.

[fol. 334] The Viewers found, inter alia, that "The 'taking' of the superterranean easement over the property of Griggs became effective on June 1, 1952, at 1201 A.M., by virtue of the Resolution of the Commissioners of Allegheny County dated May 27, 1952, designating that date and hour as the time for the opening of the Greater Pittsburgh Airport for public user. Consequently, the right to damages accrued at that time.

"The damages allowed by the Viewers have been measured by the usual procedure of deducting the after value from the value of the property as a whole immediately before and unaffected by the public improvement, to which has been added 6% per annum interest as detention money from the date of opening the Airport. We have found that the highest and best use of the property was as a country estate. We determine the 'after' diminished value of the property as being directly and immediately caused by

frequent low flying to and from the Airport, inevitably producing noise, vibration, fear of disaster, anxiety and general interference with the peaceful and quiet enjoyment of the property by the owner, resulting in damages to the extent of \$12,690.00."

Defendant appealed because it believed it had no liability. Plaintiff appealed because he believed the award of damages was inadequate. The two basic questions involved are (1) whether the County of Allegheny had any liability for the damages which plaintiff unquestionably suffered and (2) if so, what was the date of the taking and subsidiarily were the damages inadequate?

The County of Allegheny acquired the Greater Pittsburgh Airport and all the land included in and/or surrounding the airport, as well as air rights and/or easements by eminent domain, pursuant to the Act of May 21, 1923, P.L. 295, and the Second Class County Code of July [fol. 335] 28, 1953, P.L. 723, §2633, 16 PS §5623. The Airport was opened for commercial flights on July 1, 1952. The County not only owned the Airport, but it also constructed the buildings thereon and the landing fields and the runways to the airport. It also owed a duty to repair and maintain them. It leased the land and facilities for commercial flights to various airlines. Furthermore, the County knew that the approach and the path of glide or the descent path and the airlines themselves were in minute detail regulated, prescribed and directed how, when and where to fly, how, when and where to approach, and land and take off, by an independent Governmental Agency known as the Federal Aviation Agency and the Civil Aeronautics Board.

Regular and almost continuous daily flights, often several minutes apart, have been made by a number of airlines directly over and very, very close to plaintiff's residence. During these flights it was often impossible for people in the house to converse or to talk on the telephone. The plaintiff and the members of his household, (depending on the flight which in turn sometimes depended on the wind) were frequently unable to sleep even with ear plugs and sleeping pills; they would frequently be awakened by the flight and the noise of the planes; the windows of their

home would frequently rattle and at times plaster fell down from the walls and ceilings; their health was affected and impaired, and they sometimes were compelled to sleep elsewhere. Moreover, their house was so close to the runways or path of glide that as the spokesman for the members of the Airlines Pilot Association admitted "if we had engine failure we would have no course but to plow into your house." Moreover, the flights were endangered by plaintiff's trees and vice versa. The Viewers found, *inter alia*, that at the Griggs' property the surface of the approach area is only 11.86 feet above plaintiff's residence. [fol. 336] There isn't the remotest doubt and the Viewers so found that these low flights produced exceptional noise, disturbance and vibrations, placed the plaintiff and the members of his household in fear and jeopardy of their safety or lives and substantially, materially and realistically interfered with the peaceful, quiet and legally justifiable enjoyment of their property.

There are five possible solutions: (1) No recovery—*damnum absque injuria*, like cases where property owners along a railroad track cannot recover for the noise and smoke which inconveniences and upsets them. (2) The United States is liable because (a) it furnished funds to the County of Allegheny to help pay for the acquisition and construction of this airport, and (b) it approved by a contract the County's acquisition of and its master plan for this airport, and (c) it regulates and minutely orders and directs through the Civil Aeronautics Board the take-offs and landings and path of glide of all planes entering and leaving the airport. (3) The airlines which fly some or many of the flights which injure plaintiff's property and interfere with or jeopardize its existence and the safety of plaintiff and others lawfully thereon. (4) The County of Allegheny which acquired by eminent domain the ownership of the property and constructed the airport, the buildings, the approaches and runways, all of which it must maintain at its expense, leases and (to some extent) operates the airport. It clearly failed to acquire by eminent domain or otherwise sufficient land and air rights to protect plaintiff's property and his safety and life, and the safety and lives of his family.

It would be not only unfair but also unconstitutional to deny plaintiffs any recovery for the taking of either their land or an easement thereon. Article XVI, Section 8 of the Constitution of Pennsylvania provides: "Municipal and [fol. 337] other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation *for property taken, injured** or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction." The Constitution of the United States, Article V, similarly provides: "... nor shall private property be taken for public use, without just compensation."

We agree that the evidence clearly shows that there was a "taking" of plaintiff's superterranean easement, and I am convinced that the evidence demonstrates that there was a "taking" of plaintiff's entire property.

In *Miller v. Beaver Falls*, 368 Pa. 189, 82 A. 2d 34, the Court said (pages 196-197):

"... 'The law as to what constitutes a taking has been undergoing a radical change during the last few years. Formerly it was limited to the actual physical appropriation of the property or a divesting of title, but now the rule adopted in many jurisdictions and supported by the better reasoning is that *when a person is deprived of any of certain rights in and appurtenant to tangible things, he is to that extent deprived of his property*, and his property may be taken, in the constitutional sense, though his title and possession remain undisturbed . . . "and it may be laid down as a general proposition, based upon the nature of property itself, that, *whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, [fol. 338] pro tanto, taken, and he is entitled to compensation*"' [*Cheves v. Whitehead*, 1 F. Supp. 321]: 11 McQuillin, *Municipal Corporations* (3rd ed.) §32.26, p. 312. As the Court of Appeals of New York, in *Forster v. Scott*, 136

*Italics throughout, ours.

N.Y. 577, 32 N.E. 976, . . . so aptly said (page 584): ' . . . All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. . . . '

" . . . [As] Mr. Justice, later Chief Justice SCHAFER, in his opinion, after calling attention to the provisions of the Constitution of Pennsylvania, said (page 490): 'The Governing principle is accurately stated in 20 Corpus Juris, 566, "There need not be an actual, physical taking, but any destruction, restriction or interruption of the common and necessary use and enjoyment of property in a lawful manner may constitute a taking for which compensation must be made to the owner of the property." ' "

Airplanes and airports are of modern origin. The problems which have arisen in connection with airports and aircraft and air travel were unknown to the Common Law and in reality arose for the first time in the 1920s, or thereafter. Until the opening of the air age the owner of real property owned from the surface (or below) to the sky—*cujus est solum ejus est usque ad coelum*. That principle has been very substantially modified. It is now held that the owner of land owns from the surface (or lower regions) to the upper reaches and regions of the air to whatever heights may be needed for use and the enjoyment of his property. In considering the problems created by the air age, we are faced with the task of reconciling traditional common law concepts with the realities of modern day life. In our desire for progress we must not overlook or extinguish the inherent and inalienable constitutionally guaranteed rights of private property which is one of the bed-[fol. 339] rocks of our Federal and State Governments, and indeed one of the two great hallmarks of western civilization. We must not allow, in the appealing name of progress or general welfare, a property owner to be deprived by the Federal, State or County Government, or by anyone, of his property or any rights accruing therein and therefrom.

As Mr. Justice HOLMES said in his opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415-416, 43 S. Ct.

158 (in which he declared the Kohler Act of May 27, 1921, P.L. 1198 unconstitutional): "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

"The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change"

The contention that the County is exempt from liability (a) because the air space is a few feet above plaintiff's property and within the public domain, and (b) whatever injury or damage was caused was caused by the airlines, and (c) because the appropriate Federal Agency authorized the flights, is without merit. The United States Supreme Court [fol. 340] in *United States v. Causby*, 328 U.S. 256, has rejected these contentions. There, the Court, speaking through Mr. Justice DOUGLAS, pertinently said (pages 263-265):

"The fact that the path of glide taken by the planes was that approved by the Civil Aeronautics Authority does not change the result. The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C. §180. If that agency prescribed 83 feet as the minimum safe altitude, then we could have presented the question of the validity of the regulation. But nothing of the sort has been done. *The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is*

not the minimum safe altitude of flight which is the downward reach of the navigable airspace. The minimum prescribed by the Authority is 500 feet during the day and 1,000 feet at night for air carriers (Civil Air Regulations, Pt. 61, §§61.7400, 61.7401, Code Fed. Reg. Cum. Supp., Tit. 14, ch. 1), and from 300 feet to 1,000 feet for other aircraft, depending on the type of plane and the character of the terrain. Id., Pt. 60, §§60.350-60.3505, Fed. Reg. Cum. Supp., supra. Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that *in that event there would be a taking*. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms [fol. 341] of one of them—the minimum safe altitudes of flight.

"We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. See *Hinman v. Pacific Air Transport*, 84 F. 2d 755. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, *the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it*. We would not doubt that, *if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure*

rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. *The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his [fol. 342] ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.*" •

Moreover, an airport is like a bridge; the County must provide, furnish and maintain suitable approaches and the owner of the airport or bridge must take sufficient land, and in cases of airports, air approaches, easements and air rights so that it will be safe for its users. Cf. *Penn Township v. Perry County*, 78 Pa. 458; *Knoll v. Harborcreek Township*, 86 Pa. Superior Ct. 423; *Beaver Borough v. Beaver Valley Railroad Company*, 217 Pa. 280, 66 A. 520; *Miller v. Beaver Falls*, supra; *United States v. Causby*, 328 U.S. 256; *Ackerman v. Port of Seattle*, 329 Pac. 2d 210, 348 Pac. 2d 664.

Even if it be conceded arguendo that the air space in question, namely, 12 feet above plaintiff's home and buildings, is a part of the public domain, it could not, *under the Constitution* and under *United States v. Causby*, be taken for public use without proper compensation. Not only is it unsafe for the planes, but it seriously jeopardizes the health and safety of plaintiff and his family and guests and constitutes not only an unreasonable interference with his property, but also amounts to a nuisance.

The majority opinion clearly implies that the injury or taking was by the Airlines. While this is irrelevant in

• Under facts on all fours with the facts in the instant case, our sister states have held that an injunction will issue against a city or county which owns or operates an airport, on the ground that flights which jeopardize the health, safety or property of a landowner amount to a nuisance: *City of Phoenix v. Harlan*, 75 Ariz. 290, 255 P. 2d 609; *Brooks v. Patterson*, 159 Fla. 263, 31 So. 2d 472; *Delta Air Corporation v. Kersey*, 193 Ga. 862, 20 S.E. 2d 245.

the present case since the Airlines are not parties hereto, I believe that under the facts herein this position is legally unsound and realistically impossible. None of the companies which fly the airlines nor the pilots are clothed with the power of eminent domain. They follow implicitly the law, the regulations and the orders of the Government of [fol. 343] the United States or one of its agencies. They are, figuratively speaking, impotent slaves of the Federal Aviation Agency on their flights, their take-offs, their paths of glide and descent paths, and their landings. Moreover, it would be realistically impossible for a property owner to prove which Airlines damaged his property and to what extent each damaged his property. It would require a property owner to sit day and night outside his home or building for weeks or months to determine which Airline did what, and to allocate the damage and the blame, and exactly what moment of the day, week, month or year it occurred. Moreover, if he or a member of his family or employee were sitting and watching outside his home, how could he or they know, even with an interspace telephone, exactly what was happening at a particular moment to the owner's wife or those inside his home, and exactly what was happening at that particular moment to the walls, ceilings, plaster and insides of his house, and which Airline caused what?

There is likewise no merit in the County's last two contentions. The fact that the Civil Aeronautics Board or other Federal Authority approved the flights in question is irrelevant and immaterial in the present case, although it may be relevant in cases where the facts are substantially different. Although we believe that the airspace in question, i.e., 12 feet above plaintiff's home, is not a part of the public domain—Federal, State, local or otherwise—even if it were, its appropriation and use for planes flying into and out of this airport at that height would amount to a "taking" of plaintiff's property. *United States v. Causby* and cases *supra*.

In *Ackerman v. Port of Seattle*, *supra*, the Supreme Court of Washington decided that the Airport owned by [fol. 344] the Port of Seattle was liable in damages for a "taking" which resulted from low flights into the Airport

in accordance with Federally prescribed regulations or orders. Washington has the same Constitutional provision as does the Commonwealth of Pennsylvania in regard to compensation for private property taken, injured or destroyed. That Court held specifically that rights in the normal approach area which caused fear, anxiety and apprehension constituted an unreasonable interference with plaintiff's property and amounted to a "taking" by the Port of Seattle. In the course of its opinions that Court aptly said (329 P. 2d, page 216, 221 and 348 P. 2d, page 611):

"... if the state first declared certain private lands to be public domain and then built a road thereon, it is quite apparent that there would be a violation of Art. I, §16, amendment 9, of the Washington constitution. We believe this is as true with space in the air as it is with the surface of land. The government simply cannot arbitrarily declare that all of the airspace over a person's land is public domain and then, cavalierly, claim absolute immunity against property owners' claims for any and all possible damages....

"... under this constitutional provision, a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character; it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate,...."

"This interpretation of Congress' declaration as to what constitutes public domain in the airspace is supported by the Federal government's policy of condemning and compensating for air easements over property adjoining Federal air bases. See *United States v. 48.10 Acres of Land, etc.*, D.C.S.D.N.Y. 1956, 144 F. Supp. 567*.... Clearly, [fol. 345] *an adequate approach way* is as necessary a part of an airport as is the ground on which the airstrip, itself, is constructed, if the private airspace of adjacent landowners is not to be invaded by airplanes using the airport.

* The City of Philadelphia similarly acquires by purchase or otherwise air rights over properties adjacent to its International Airport in order to comply with the Constitution of Pennsylvania and the Constitution of the United States.

The taking of an approach way is thus reasonably necessary to the maintenance and operation of the airstrip."

Finally, the fact that the Civil Aeronautics Board approved the plan for the airport will not relieve the County which is the owner of the airport and the adjoining land. If there could be any doubt as to the County's liability it would unquestionably be removed by (1) well settled principles of law and (2) by *United States v. Causby*, supra, and (3) by the agreement entered into between the United States and the County by which the County obtained enormous federal aid for the construction of this airport. In that agreement the County specifically undertook, inter alia, the following:

"(i) Insofar as is within its powers and reasonably possible, the Sponsor will prevent the use of any land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, take-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either by the adoption and enforcement of a Zoning Ordinance and regulations, or by the acquisition of easements or other interests in land or airspace, or by both such methods."

[fol. 346] The duty and legal obligation to acquire land, buildings, easements and other interests in land and in air space which, unless acquired, would create a hazard to the landing, take-off, paths of glide, descent paths and authorized flights of aircraft, or otherwise limit the safety, usefulness and adequacy of the Airport, was clearly and unquestionably by the terms of this contract that of the County of Allegheny. It follows that the County is liable to the plaintiff (1) under and by virtue of the well and long settled Common Law principle of *sic utere tuo ut alienum non laedas*, and (2) under the *United States v. Causby* case, and (3) by reason of the aforesaid contract which the County made and entered into with the United States of America.*

* Per the Administrator of Civil Aeronautics.

The Viewers determined the taking of plaintiff's property as of the opening of the Airport June 1, 1952, pursuant to a prior County ordinance. The great difficulty which arises because of the complexity of the facts in this case is instantly apparent, and it is virtually a practical impossibility to fix any other date for the taking. We cannot say that the date which the Viewers found constituted a taking was erroneous. Moreover, in view of the conflicting testimony and the inherent difficulty of appraising and fixing the damage which plaintiffs suffered, we cannot say that the Viewers erred in their verdict.

I would affirm the Orders of the lower Court.

Mr. Justice Eagen joins in this dissenting opinion.

[fol. 347] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 348]

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

No. 155 March Term, 1960

THOMAS N. GRIGGS

v.

COUNTY OF ALLEGHENY

Supplemental Brief and Appendix

Appeal of County of Allegheny from the Order of the
Court of Common Pleas of Allegheny County
of March 8, 1960 at No. 2384
July Term, 1958

[fol. 349]

AMENDMENT TO GRANT AGREEMENT

Greater Pittsburgh Airport
Allegheny County, Pennsylvania
Project No. 9-36-029-801

Whereas, the Administrator of Civil Aeronautics has determined that, in the interest of the United States, the Grant Agreement between the Administrator of Civil Aeronautics, acting for and on behalf of the United States, and the County of Allegheny, Pennsylvania, accepted by said County of Allegheny on the 22nd day of June, 1948, should be amended as hereinafter provided:

Now, Therefore, Witnesseth:

That, in consideration of the benefits to accrue to the parties hereto, the Administrator of Civil Aeronautics, on behalf of the United States, on the one part, and the County of Allegheny, Pennsylvania, on the other part, do hereby mutually agree that the Grant Agreement accepted by the Sponsor under date of June 22, 1948, be and the same is hereby amended by adding thereto as paragraph 8 of the following provisions:

8. (a) It is hereby understood and agreed that the Sponsor's Assurance Agreement incorporated in and constituting part of this Grant Agreement is hereby amended by deleting subsections (b) through (o) of Section 1 thereof, and inserting in lieu thereof the following:

[fol. 350] "(b) These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal-aid for the Project or any portion thereof, made by the Administrator, and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed under the Project but in any event not to exceed twenty

years from the date of said acceptance of an offer of Federal-aid for the Project.

- (c) The Sponsor will operate the Airport as such for the use and benefit of the public. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will keep the Airport open to all types, kinds and classes of aeronautical use without discrimination between such types, kinds and classes: Provided, That the Sponsor may establish such fair, equal and non-discriminatory conditions to be met by all users of the Airport as may be necessary for the safe and efficient operation of the Airport: And provided further, That the Sponsor may prohibit any given type, kind or class of aeronautical needs of the area served by the Airport.
- (d) The Sponsor will not exercise, grant or permit any exclusive right for the use of the Airport forbidden by section 303 of the Civil Aeronautics Act of 1938, as amended. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will not either directly or indirectly exercise, or grant to any person, firm or corporation, or permit any person, firm, or corporation to exercise, any exclusive right for the use of the Airport for commercial flight operations, including air carrier transportation, rental of aircraft, conduct of charter flights, operation of flight schools or the carrying on of any other service or operation requiring the use of aircraft.
- (e) The Sponsor agrees that it will operate the Airport for the use and benefit of the public, on fair and reasonable terms and without unjust discrimination. In furtherance of this covenant (but without limiting its general applicability

and effect), the Sponsor specifically covenants and agrees:

[fol. 352] (1) That in any agreement, contract, lease or other arrangement under which a right or privilege at the Airport is granted to any person, firm, or corporation to render any service or furnish any parts, materials, or supplies (including the sale thereof) essential to the operation of aircraft at the Airport, the Sponsor will insert and enforce provisions requiring the contractor:

- (a) To furnish good, prompt and efficient service adequate to meet all the demands for its service at the Airport,
- (b) To furnish said service on a fair, equal and non-discriminatory basis to all users thereof, and
- (c) To charge fair, reasonable and non-discriminatory prices for each unit of sale or service: Provided, That the contractor may be allowed to make reasonable and non-discriminatory discounts, rebates or other similar types of price reductions to volume purchasers.

[fol. 353] (2) That it will not exercise or grant any right or privilege which would operate to prevent any person, firm, or corporation operating aircraft on the Airport from:

- (a) Performing any service on its own aircraft with its own employees (including, but not limited to maintenance and and repair) that it may choose to perform,
- (b) Purchasing off the Airport and having delivered on the Airport without entrance fee, delivery fee or other surcharge for delivery any parts, materials or supplies necessary for the servicing,

repair or operation of its aircraft: Provided, That the Sponsor may make reasonable charges for the cost of any service (including charges for maintenance, operation and depreciation of facilities and rights-of-way) furnished by the Sponsor in connection with the delivery of any parts, materials or supplies: And provided further, That in case of aviation gasoline and oil purchased off the Airport and delivered to the Airport, the Sponsor may require the aviation gasoline and oil to be stored in specified places, limiting the amount delivered to the amount of storage space available, and if necessary for the safe and efficient operation of the Airport, require persons furnishing their own aviation gasoline and oil to utilize such storage, dispensing and delivery system as the Sponsor may designate.

- (3) That if it exercises any of the rights or privileges set forth in subsection (1) of this paragraph it will be bound by and adhere to the conditions specified for contractors set forth in said subsection (1).
- (f) Nothing contained herein shall be construed to prohibit the granting or exercise of an exclusive right for the furnishing of non-aviation products and supplies or any service of a non-aeronautical nature.
- [fol. 355] (g) The Sponsor will suitably operate and maintain the Airport and all facilities thereon or connected therewith which are necessary for airport purposes other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for aeronautical purposes: Provided, That nothing contained herein shall be construed

to require that the Airport be operated and maintained for aeronautical uses during temporary periods when snow, flood, or other climatic conditions interfere substantially with such operation and maintenance. Essential facilities, including night lighting systems, when installed, will be operated in such a manner as to assure their availability to all users of the Airport.

- (h) To the extent of its financial ability, the Sponsor will replace and repair all buildings, structures, and facilities developed under the Project which are destroyed or damaged, replacing or restoring them to a condition comparable to that preceding the destruction or damage, if such buildings, structures, and facilities are determined by [fol. 356] the Administrator to be necessary for the normal operation of the Airport.
- (i) Insofar as is within its powers and reasonably possible, the Sponsor will prevent the use of any land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, taking-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either by the adoption and enforcement of a zoning ordinance and regulations or by the acquisition of easements or other interests in lands or airspace, or by both such methods. With respect to land outside the boundaries of the airport, the Sponsor will also remove or cause to be removed any growth, structure, or other object thereon which would be a hazard to the landing, taking-off, or maneuvering of aircraft at the Airport, or if such removal is not feasible, will mark or light such growth, structure, or other object as an airport obstruction or cause it to be so marked

or lighted. The airport approach standards to be [fol. 357] followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 672 dated September 1, 1946, unless otherwise authorized by the Administrator.

- (j) All facilities of the Airport developed with Federal aid and all those usable for the landing and and taking-off of aircraft will be available to the United States at all times, without charge, for use by military and naval aircraft in common with other aircraft, except that if the use by military and naval aircraft is substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining facilities so used, may be charged. The amount of use to be considered "substantial" and the charges to be made therefor shall be determined by the Sponsor and the using agency.
- (k) The Spohsor will furnish to any civil agency of the United States, without charge (except for light, heat, janitor service, and similar facilities and services at the reasonable cost thereof), such space in airport buildings as may be reasonably adequate for use in connection with any [fol. 358] airport air traffic control activities, weather-reporting activities, and communications activities related to airport air traffic control, which are necessary to the safe and efficient operation of the Airport and which such agency may deem it necessary to establish and maintain at the Airport for such purpose.
- (l) After completion of the Project and during the term of these covenants, the Sponsor will maintain a current system of Airport accounts and records, using a system of its own choice, sufficient to provide annual statements of income and expense. It will furnish the Administrator with such annual or special Airport financial

and operational reports as he may reasonably request. Such reports may be submitted to the Administrator on forms furnished by him, or may be submitted in such other manner as the Sponsor elects, provided the essential data are furnished. The Airport and all airport records and documents affecting the Airport, including deeds, leases, operation and use agreements, regulations, and other instruments, will be available for inspection by any duly authorized representative of the Administrator upon reasonable request. The Sponsor will furnish to the Administrator, upon request a true copy of any such document.

- (m) The Sponsor will not enter into any transaction which would operate to deprive it of any of the rights and powers necessary to perform any or all of the covenants made herein, unless by such transaction the obligation to perform all such covenants is assumed by another public agency eligible under the Act and the regulations to assume such obligations and having the power, authority and financial resources to carry out all such obligations. If an arrangement is made for management or operation of the Airport by any agency or person other than the Sponsor or an employee of the Sponsor, the Sponsor will reserve sufficient powers and authority to insure that the Airport will be operated and maintained in accordance with the Act, the Regulations, and these covenants.
- (n) The Sponsor will maintain a master plan (layout) of the Airport having the current approval of the Administrator. Such plan shall show [fol. 360] building areas, approach areas, and landing areas, indicating present and future proposed development. The Sponsor will conform to such master plan (layout) in making any future improvements or changes at the Airport which, if made contrary to the master plan

(layout), might adversely affect the safety, utility, or efficiency of the Airport."

and by renumbering subsection (p) of said Section 1, subsection (o).

In Witness Whereof, the parties hereto have hereby caused this amendment to said Grant Agreement to be duly executed as of the 21st day of September, 1948.

United States of America, Administrator of Civil Aeronautics, By Ora W. Young, Regional Administrator, Region I.

Allegheny County, Pennsylvania, By John J. Kane, Title, Chairman Board of County Commissioners.

[Seal]

Attest: M. N. Snyder, Title: Chief Clerk.

[fol. 361]

CERTIFICATE OF SPONSOR'S ATTORNEY

I, Nathaniel K. Beck, acting as Attorney for the County of Allegheny, Pennsylvania, do hereby certify:

That I have examined the foregoing Amendment to Grant Agreement and the proceedings taken by said County of Allegheny, Pennsylvania, relating thereto, and find that the execution thereof is in all respects due and proper and in accordance with the laws of the State of Pennsylvania, and further that, in my opinion, said Amendment to Grant Agreement constitutes a legal and binding obligation of the County of Allegheny, Pennsylvania, in accordance with the terms thereof.

Dated at Pittsburgh, Pa., this 25th day of September, 1948.

Nathaniel K. Beck, Title: County Solicitor.

[fol. 362]

SUPREME COURT OF THE UNITED STATES

No. 910, October Term, 1960

THOMAS N. GRIGGS, Petitioner,

vs.

COUNTY OF ALLEGHENY.

ORDER ALLOWING CERTIORARI—June 5, 1961

The petition herein for a writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania, Western District is granted. The case is transferred to the summary calendar and set for argument immediately following No. 881.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.